United Nations A/CN.4/601

General Assembly

Distr.: General
29 May 2008
English
Original: Russian

International Law Commission
Sixtieth session
Geneva, 5 May-6 June and 7 July-8 August 2008

Preliminary report on immunity of State officials from foreign criminal jurisdiction

By Roman Anatolevich Kolodkin, Special Rapporteur

08-35715 (E) 110708 250808

Contents

		Page
I.	Introduction	4
II.	Purpose of the preliminary report	4
III.	History of the consideration of the question of immunity of State officials from foreign jurisdiction by the International Law Commission and the Institute of International Law	5
	A. Work of the Commission	5
	B. Work of the Institute	12
IV.	Preliminary issues	13
	A. Sources	13
	1. International treaties	13
	2. Customary international law	15
	3. International comity	18
	4. Role of international and domestic law	19
	5. Material to be used	22
	B. Immunity and jurisdiction	22
	1. Jurisdiction	22
	2. Criminal jurisdiction	24
	3. Criminal jurisdiction and civil jurisdiction	25
	4. Immunity	27
	5. Immunity from criminal jurisdiction and its procedural nature	30
	6. Immunity, the non-justiciability doctrine and the act of State doctrine	34
	7. Immunity of officials *ratione personae* and immunity of officials *ratione materiae*	37
	8 Rationale for the immunity of State officials from foreign criminal jurisdiction	39
	9. Immunity of State officials; diplomatic and consular immunities	49
	C. Summary	51
V.	Issues to be considered when defining the scope of the topic	52
	A. Boundaries of the topic	52

B. Persons covered 53
1. All officials; definition of the concept of "State official" 53
2. Officials enjoying immunity *ratione personae* 56
3. The question of recognition in the context of this topic 63
4. Family members 64
C. Summary 66

I. Introduction

1. At its fifty-eighth session, the International Law Commission, on the recommendation of the Planning Group,[1] endorsed the inclusion in its long-term programme of work of the topic "Immunity of State officials from foreign criminal jurisdiction".[2] A brief outline of the topic, including a select bibliography, was annexed to the report of the Commission on its fifty-eighth session.[3]

2. During the discussion in the Sixth Committee of the General Assembly of the new topics included in the long-term programme of work of the Commission, there was general support for this topic. In that connection, "[t]he view was expressed that the time seemed ripe to take stock of present practice and to attempt to elaborate general rules on the subject. It was also noted that due priority should be given to the need for State officials to enjoy such immunity, for the sake of stable relations among States" (A/CN.4/577, para. 126). At its fifty-ninth session, the Commission decided to include this topic in its current programme of work.[4] By its resolution 62/66 of 8 December 2007, the General Assembly took note of that decision.

II. Purpose of the preliminary report

3. The present preliminary report briefly describes the history of the consideration by the Commission and the Institute of International Law of the question of immunity of State officials from foreign jurisdiction and outlines the range of issues proposed for consideration by the Commission in the preliminary phase of work on the topic. These issues, on which the Commission's views will be important for further consideration of the substance of the topic, include:

(a) The issue of the sources of immunity of State officials from foreign criminal jurisdiction;

(b) The issue of the content of the concepts of "immunity" and "jurisdiction", "criminal jurisdiction" and "immunity from criminal jurisdiction" and the relationship between immunity and jurisdiction;

(c) The issue of the typology of immunity of State officials (immunity *ratione personae* and immunity *ratione materiae*);

(d) The issue of the rationale for immunity of State officials and the relationship between immunity of officials and immunity of the State, diplomatic and consular immunity and immunity of members of special missions;

(e) The issues to be considered when determining the scope of this topic.

4. The latter include:

---

[1] The Planning Group in turn based its recommendation on the report submitted to it by the Working Group on Long-term Programme of Work, in which it proposed six new topics, including the present one, for inclusion in the long-term programme of work of the Commission (see A/CN.4/L.704, para. 4).

[2] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257.

[3] Ibid., annex A.

[4] Ibid., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 376.

(a) Whether all State officials or only some of them (for example, only Heads of State, Heads of Government and ministers for foreign affairs) should be covered by the future draft guiding principles or draft articles that may be prepared by the Commission resulting from its consideration of the topic;

(b) The extent of immunity enjoyed by current and former State officials to be covered by the topic under consideration;

(c) The waiver of immunity of State officials (and possibly other procedural aspects of immunity).

5. Thus the purpose of the report is to give a rough outline of two types of issue: firstly, those which should in principle be analysed by the Commission as part of its consideration of the topic of immunity of State officials from foreign criminal jurisdiction; secondly, those which should probably be addressed by the Commission in a possible formulation of any instrument resulting from the consideration of this topic — for example, draft guiding principles or draft articles.

III. History of the consideration of the question of immunity of State officials from foreign jurisdiction by the International Law Commission and the Institute of International Law

A. Work of the Commission

6. The survey of international law prepared by the Secretariat for the Commission before its first session in 1948 contains a section entitled "Jurisdiction over foreign States", which is said to cover "the entire field of jurisdictional immunities of States and their property, of their public vessels, *of their sovereigns*, and of their armed forces" (emphasis added)[5].

7. The Commission touched on the issue in 1949, when it was preparing the draft Declaration on Rights and Duties of States. Draft article 2 states: "Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law".[6] The commentary to this draft article notes that "the concluding phrase is a safeguard for protecting such immunities as those of diplomatic officers and officials of international organizations".[7] State officials are thus not directly mentioned as such.

8. The issue was considered during the preparation of the draft Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the Commission in 1950. According to draft principle III, "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law".[8] As noted in the Commission's commentary, this text is based on article 7 of the charter of the

[5] United Nations publication, Sales No. 1948.V.1 (I), para. 50.

[6] *The Work of the International Law Commission*, 6th ed., vol. I, p. 262.

[7] *Report of the International Law Commission to the General Assembly*, annex to General Assembly resolution 375 (IV) of 6 December 1949, p. 287.

[8] *Yearbook of the International Law Commission 1950*, vol. II, p. 375.

Nürnberg Tribunal.[9] According to the Commission, the same idea was expressed in the following passage of the Tribunal judgment: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law".[10]

9. This subject was also considered by the Commission in its work on the 1954 draft code of crimes against the peace and security of mankind. According to draft article 3 of the Code, which is similar to draft principle III of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, "The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code".[11]

10. This idea is reflected, in a somewhat different wording, in draft article 7 of the Code of Crimes against the Peace and Secu ity of Mankind, adopted by the Commission in 1996: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment".[12] In draft article 11 proposed in 1988, which became draft article 7 in the final version of the draft Code, instead of "even if he acted as head of State or Government" the words "and particularly the fact that he acts as head of State or Government" were used.[13] The commentary to this article states, inter alia, that the wording contains elements from the corresponding provisions of the Charters of the Nürnberg and Tokyo Tribunals, the Nürnberg principles adopted by the Commission in 1950 and the draft Code adopted by the Commission in 1954.[14]

---

[9] "The official position of defendants, whether Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." United Nations, *Treaty Series*, vol. 82, No. 251, at p. 288.

[10] *Yearbook ... 1950*, vol. II, p. 375. As noted by O. Triffterer, the wording of the Principles adopted by the Commission differs slightly from the provisions in the documents of the Nürnberg Tribunal "in wording but not in substance except for the fact that the words 'or mitigating punishment' were no longer included". *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (Baden-Baden: Nomos, 1999), p. 503.

[11] *Yearbook ... 1954*, vol. II, p. 152.

[12] *Yearbook ... 1996*, vol. II, p. 26.

[13] *Yearbook ... 1988*, vol. II (Part Two) p. 71.

[14] Ibid. In addition, the Commission noted: "Although it refers expressly to Heads of State or Government, because they have the greatest power of decision, the words 'the official position of an individual ... and particularly' show that the article also relates to other officials. The real effect of the principle is that the official position of an individual who commits a crime against peace and security can never be invoked as a circumstance absolving him from responsibility or conferring any immunity upon him, even if the official claims that the acts constituting the crime were performed in the exercise of his functions." In the commentary to the final draft of article 7, the Commission noted: "It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions ..." (*Yearbook ... 1966*, vol. II (Part Two), p. 27). However, J. Verhoeven states, on the subject of this provision of the 1996 draft Code, that "... such a provision does not ipso facto imply either that immunity should be maintained or that it should be waived: it is simply unrelated to immunity". "Les immunités propres aux organes ou autres agents des sujets du droit international", in J. Verhoeven (dir.), *Le droit international des immunités: contestation ou consolidation?*, (Brussels: Larcier, 2004), p. 92.

11. It should be noted that both the draft Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal and the draft Code of Crimes against the Peace and Security of Mankind were conceptually related to the idea of an international criminal jurisdiction (although originally the draft Code had been intended for use by both national and international courts). The commentaries to the Nürnberg Principles adopted by the Commission were based mainly on the conclusions of the Nürnberg Tribunal.[15] Regarding the Code of Crimes against the Peace and Security of Mankind, the Commission noted: "As to the implementation of the code, since some members considered that a code unaccompanied by ... a competent criminal jurisdiction would be ineffective, the Commission requested the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals."[16] When the draft statute for the International Criminal Court, prepared by the Commission at the request of the General Assembly within the framework of the draft Code of Crimes against the Peace and Security of Mankind,[17] became a separate document, regret was expressed in the Sixth Committee because "the court had originally been envisaged as a legal body in which the Code would be applied".[18] In this regard, the footnote to the commentary to draft article 7 of the 1996 Code is significant. Noting that "[t]he absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defense", the Commission saw fit to add in a footnote: "Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment".[19]

---

[15] *Yearbook ... 1950*, vol. II, p. 191, para. 42.

[16] *Yearbook ... 1988*, vol. II (Part Two), p. 55, para. 198. In this regard, a typical statement was made, for example, by the Commission member Mr. McCaffrey when discussing the draft article on the obligation to punish or prosecute. He said, inter alia, that he did not believe that universal jurisdiction would be any more acceptable to States than an international criminal court — in fact, it might be less so. Consequently he was not sure that the Commission would be well advised to proceed with the drafting of the article on universal jurisdiction before having at least attempted to draft the statute of an international criminal court. *Yearbook ... 1988*, vol. I, p. 273. See also *Yearbook ... 1989*, vol. II (Part Two), pp. 65 and 66, paras. 211-216.

[17] By its resolution 44/39 of 4 December 1989, the General Assembly requested the Commission "when considering at its forty-second session the *item entitled 'Draft Code of Crimes against the Peace and Security of Mankind'*, to address the question of establishing an international criminal court or other international criminal trial mechanism with *jurisdiction over persons alleged to have committed crimes which may be covered under such a code*" (emphasis added) (available at http://untreaty.un.org/ilc/guide/7_4.htm). By resolution 46/54 of 9 December 1991, the Assembly invited the Commission "... *within the framework of the draft Code of Crimes against the Peace and Security of Mankind*, to consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal mechanism ..." (emphasis added).

[18] A/CN.4/472, para. 42. It was also noted that "the Code would be better implemented by an international criminal court than by national courts" (para. 43). The view was also expressed that "the Code and the future court shared a common purpose of enabling *national courts* or an international body to punish particularly abhorrent crimes committed by States or individuals" (para. 45, emphasis added).

[19] *Yearbook ... 1996*, vol. II (Part Two), p. 27.

12. It should also be borne in mind that, in considering this provision of the draft Code, the Commission took into account the fact that a number of States had raised the related issue of the possible immunity of State officials, including Heads of State or Government. In that connection, the Chairman of the Drafting Committee, introducing the draft Code adopted by it on second reading in the plenary, noted that, in the opinion of the Drafting Committee, the issue of immunity was a matter of implementation of the Code and therefore should not be dealt with in the part of the Code on general principles.[20]

13. The Commission considered the issue of immunity of State officials from foreign jurisdiction when preparing the draft articles on jurisdictional immunities of States and their property. In accordance with article 2, paragraph 1 (*b*) (*v*), "State" means "representatives of the State acting in that capacity".[21] These representatives include Heads of State or Government, heads of ministerial departments, ambassadors, heads of missions, diplomatic agents and consular officials.[22] The words "in that capacity" at the end of article 2, paragraph 1 (*b*) (*v*), were intended to clarify that this immunity is accorded to the representative capacity of such persons *ratione materiae*.[23] The draft articles do not cover the immunities *ratione personae* to which, as noted by the Commission, Heads of State and ambassadors "are entitled".[24]

14. It was initially suggested that, in considering this topic, the Commission should consider immunities in various forms and manifestations; for instance, immunities from civil, administrative and criminal jurisdiction. This proposal was contained in a report of the working group established by the Commission to consider the question of future work by the Commission on the topic.[25] The seventh and eighth reports of the Special Rapporteur, Mr. Sucharitkul, contained, inter alia, draft article 25 on the immunities *ratione personae* of "personal sovereigns and other heads of State", including immunities from the criminal jurisdiction of another State.[26] This draft article was criticized at the thirty-first session of the Commission and was not included in the draft articles submitted to the General Assembly.[27] The draft articles made no further mention of the immunity of Heads of State (or other State representatives) from criminal jurisdiction.

15. The Commission confined itself to the inclusion of a "without prejudice" clause in the draft articles. In accordance with article 3, paragraph 2, the articles are "without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*". As indicated in the commentary to that paragraph, "[t]he present draft articles do not prejudge the extent of immunities granted by States to foreign sovereigns or other heads of State, their families or household staff which may also, in practice, cover other members of their entourage. Similarly, the

---

[20] *Yearbook ... 1995*, vol. I, p. 202, para. 36.

[21] *Yearbook ... 1991*, vol. II (Part Two), p. 14.

[22] Ibid., p. 18, para. 17. From the commentary to draft article 2 it is clear that this list was not exhaustive. In the opinion of the Commission, all natural persons authorized to represent the State enjoy State immunity.

[23] Ibid.

[24] Ibid., p. 18, para. 19.

[25] *Yearbook ... 1978*, vol. II (Part Two), p. 154, para. 22.

[26] *Yearbook ... 1985*, vol. II (Part One), pp. 44 and 45; *Yearbook ... 1986*, vol. II (Part One), p. 31.

[27] For the Commission's discussion of draft article 25, submitted in the eighth report of the Special Rapporteur, see *Yearbook ... 1986*, vol. I, pp. 9-28.

present draft articles do not prejudge the extent of immunities granted by States to heads of Government and ministers for foreign affairs. Those persons are, however, not expressly included in paragraph 2, since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons. A proposal was made at one stage to add after 'heads of State' in paragraph 2, heads of government and ministers for foreign affairs, but was not accepted by the Commission".[28] Another noteworthy part of the commentary reads: "The reservation of article 3, paragraph 2, therefore refers exclusively to the private acts or personal immunities ... accorded in the practice of States, without any suggestion that their status should in any way be affected by the present articles. The existing customary law is left untouched."[29]

16. The immunity of State officials from the criminal jurisdiction of another State and the status of State officials were issues considered by the Commission when preparing the draft articles on diplomatic and consular relations; on special missions; on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons; and on the representation of States in their relations with international organizations.

17. The draft articles on diplomatic relations, on consular relations, on special missions and on the representation of States in their relations with international organizations made reference to special categories of State officials, including "diplomatic agents", "consular officials", "representatives of the sending State" and "delegates", who are entrusted by a State with performing on its behalf certain functions in its relations with another State or with an international organization. The draft articles provided that those categories of State officials would enjoy immunity from the criminal jurisdiction of the receiving State.[30]

18. An issue of particular interest was the Commission's consideration of the status of the Head of State and other persons of high rank when preparing the draft articles on special missions. The Commission initially considered the possibility of including in the draft articles a section on so-called high-level special missions, which would have included missions led by Heads of State, Heads of Government, ministers for foreign affairs and other ministers.[31] The Special Rapporteur submitted draft provisions on such special missions at the seventeenth session of the

[28] *Yearbook ... 1991*, vol. II (Part Two), p. 22, para. 7.

[29] Ibid., para. 6.

[30] See, in particular: articles 27, 29, 30, 37, 38, 39 and 40 of the draft articles on diplomatic relations and the commentaries thereto (*Yearbook ... 1958*, vol. II, pp. 97-99 and 102-104); articles 41, 43, 45, 53, 54 and 55 of the draft articles on consular relations and the commentaries thereto (*Yearbook ... 1961*, vol. II, pp. 115-119 and 122-123); articles 29, 31, 41, 43 and 44 of the draft articles on special missions and the commentaries thereto (*Yearbook ... 1967*, vol. II, pp. 361, 362, 365 and 366); and articles 28, 30, 31, 37, 38, 59, 61, 62, 68 and 69 of the draft articles on the representation of States in their relations with international organizations and the commentaries thereto (*Yearbook ... 1971*, vol. II (Part One), pp. 302-305, 308, 309, 319-321 and 323).

[31] "At its sixteenth session, the International Law Commission decided to ask its Special Rapporteur to submit at its succeeding session an article dealing with the legal status of the so-called high-level Special Missions, in particular, Special Missions led by Heads of State, Heads of Governments, Ministers of Foreign Affairs and Cabinet Ministers." *Yearbook ... 1967*, vol. II, p. 393.

Commission.[32] Those draft provisions ("rules") envisaged complete inviolability and full immunity from the jurisdiction of the receiving State for Heads of State, Heads of Government, ministers for foreign affairs and other ministers leading special missions.[33] The Commission did not discuss the draft articles themselves but considered whether special rules should be laid down for such missions.[34] Taking into account the opinion of States on that issue, the Commission recommended the Special Rapporteur not to prepare draft provisions concerning so-called high-level special missions but to include in the draft articles a provision on the status of the Head of State as head of a special mission, and to consider whether it was desirable to mention the particular situation of such special missions in the provisions dealing with certain immunities.[35] In that connection, the draft articles submitted by the Commission to the General Assembly in 1967 included draft article 21 on the status of the Head of State and persons of high rank, which reads as follows:

> 1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State, in addition to what is granted by these articles, the facilities, privileges and immunities accorded by international law to Heads of State on an official visit;
>
> 2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by these articles, the facilities, privileges and immunities accorded by international law.[36]

19. The commentary to this draft article noted that "in international law ... rank may confer on the person holding it exceptional facilities, privileges and immunities which he retains on becoming a member of a special mission" and that "[t]he Commission did not specify the titles and ranks which these 'other persons' must hold in order to enjoy additional facilities, privileges and immunities, since such titles and ranks would vary from one State to another according to the constitutional law and protocol in force".[37] The Commission thus left it unclear who was included among the persons "of high rank", including in draft article 21, paragraph 2, only two generally accepted examples: the Head of Government and the minister for foreign affairs. The extent of the immunities granted by international law beyond the scope of the draft articles, to Heads of State, Heads of Government, ministers for foreign affairs and other officials "of high rank" also remained unclear.

20. A similar article was included in the draft articles on the representation of States in their relations with international organizations, submitted by the

---

[32] *Yearbook ... 1965*, vol. II, pp. 143 and 144. In that respect, the Special Rapporteur, Mr. Bartoš, noted: "Despite all his efforts to establish what are the rules specially applicable to missions of this kind, the Special Rapporteur has not succeeded in discovering them either in the practice or in the literature." Ibid., p. 143.

[33] Ibid., pp. 143 and 144, draft rule 2 (i) and (j); draft rule 3 (e) and (g); draft rule 4 (f) and (h); and draft rule 5 (d) and (f).

[34] *Yearbook ... 1966*, vol. I (Part Two), pp. 259-261. Summing up the discussion, the Special Rapporteur noted, inter alia: "There could be no doubt that for missions led by a Head of State rules of general international law already existed, so that there was no need to lay down any special rules." Ibid., p. 261.

[35] *Yearbook ... 1966*, vol. II, p. 277, para. 69.

[36] *Yearbook ... 1967*, vol. II, p. 359.

[37] Ibid.

Commission to the General Assembly in 1971.[38] As noted by the Commission in its commentary to the draft article, several States had expressed the view in their written comments that article 50 was on the whole unnecessary, since the persons concerned "would enjoy the facilities, privileges and immunities accorded to them by international law whether the article was included or not in the draft".[39] The Commission nevertheless decided to retain the draft article, pointing out in the commentary that it reflected "a well-established practice".[40]

21. Also of interest is the Commission's consideration of the definition of the term "internationally protected person" for the purposes of the draft articles on the prevention and punishment of crimes against internationally protected persons. In defining this term for the purposes of the draft articles, the Commission also thereby determined the scope of application of the draft articles, *ratione personae*. In accordance with article 1, paragraph 1, of the draft articles submitted by the Commission to the General Assembly in 1972, for the purposes of the draft articles "'internationally protected person' means: (a) A Head of State or a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him; (b) Any official of either a State or an international organization who is entitled, pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State or international organization, as well as members of his family who are likewise entitled to special protection".[41]

22. As noted in the commentary to the draft article, in subparagraph (a) specific mention is made of a Head of State or a Head of Government on account of the exceptional protection which, under international law, attaches to such a status.[42] The Commission emphasized that a Head of State or a Head of Government "is entitled to special protection whenever he is in a foreign State and whatever may be the nature of his visit — official, unofficial or private".[43]

23. A proposal for the text of the draft article to indicate that international protection should also be extended to cabinet members or other persons of similar (high) rank, at all times and in all circumstances when in a foreign State, was rejected. Firstly, the Commission decided that, while there was some support for the principle that such persons were entitled to international protection, "it could not be based upon any broadly accepted rule of international law and consequently should not be proposed".[44] Secondly, the opponents of this proposal pointed out that the Commission had already considered the possibility of using similar wording (for

[38] "Article 50. Status of the Head of State and persons of high rank

1. The Head of the sending State, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to Heads of State.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a delegation of the sending State, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to such persons."

Yearbook ... 1971, vol. II (Part One), p. 315.

[39] Ibid.

[40] Ibid.

[41] *Yearbook ... 1972*, vol. II, p. 312.

[42] Ibid.

[43] Ibid.

[44] Ibid, p. 313.

example, "other personality of high rank") in its work on special missions and on the representation of States in their relations with international organizations, but had decided against such wording because its meaning was not sufficiently precise.[45]

24. Unlike Heads of State or Government, the entitlement of the officials mentioned in draft article 1 (b) to special protection, in the opinion of the Commission, depends on the performance by them of official functions.[46]

B. Work of the Institute

25. The Institute first considered the issue of the immunity of Heads of State from the jurisdiction of foreign courts in the nineteenth century. Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or Heads of State were adopted in 1891.[47] The immunity of a Head of State was considered in the context of the immunity of the State. The articles did not single out immunity from foreign criminal jurisdiction and referred to immunity in general terms. In accordance with draft articles 4 to 6, national courts could consider only a very limited number of civil legal actions against Heads of foreign States.[48]

---

[45] *Yearbook ... 1972*, vol. I, p. 237. The last argument, as we know, did not reflect the final outcome of the Commission's work on both the topics mentioned: the draft articles on special missions and on the representation of States in their relations with international organizations included a reference to "other persons of high rank", alongside Heads of State and ministers for foreign affairs.

[46] Ibid., vol. II, pp. 313 and 314. Thus, a diplomatic agent on vacation in a State other than a host or receiving State would not normally be entitled to special protection (ibid., p. 313).

[47] *Yearbook of the Institute of International Law*, 1889-1892, vol. XI, pp. 426-438. The draft text is also available (in French only) on the Institute's website: www.idi-iil.org/idiF/resolutionsF/1891_ham_01_fr.pdf. For consideration of this subject by the Institute, see also J. Verhoeven, "Les immunités de jurisdiction et d'exécution. Rapport provisoire" (December 2000), *Yearbook of the Institute of International Law*, vol. 69 (2000-2001), p. 487.

[48] "Article 4

The only admissible actions against a foreign State are:

1. Actions *in rem*, including possessory actions relating to immovable or movable property in the territory;

2. Actions based on the status of the foreign State as heir or legatee of a national of the territory, or as having an entitlement to a succession opened in the territory;

3. Actions relating to a commercial or industrial establishment or a railway operated by the foreign State in the territory;

4. Actions for which the foreign State has expressly recognized the competence of the court ...;

5. Actions arising from contracts concluded by the foreign State in the territory, if full performance thereof in the same territory may be requested by virtue of an express clause or by virtue of the very nature of the action;

6. Claims for damages arising as a result of a delict or quasi-delict committed in the territory.

Article 5

Actions brought as a result of acts of sovereignty, actions arising from a contract of the claimant acting as a State official and actions having regard to debts of the foreign State incurred by public donations shall not be admissible.

Article 6

Actions brought against foreign sovereigns and Heads of State shall be subject to the rules laid down in articles 4 and 5." Institute of International Law, *Tableau général des résolutions* (1873-1956), Basel, 1957, pp. 15 and 16.

26. The Institute examined the issue of immunity of Heads of State for the second time at the turn of this century, when the topic had begun to attract a great deal of public, political and professional interest.[49] This resulted in the adoption by the Institute in 2001 of a resolution enabled "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law".[50] The resolution provides for the immunity of a serving Head of State and a serving Head of Government from criminal jurisdiction before the courts of a foreign State, irrespective of the gravity of the offence committed.[51] Under the resolution, former Heads of State and Heads of Government enjoy immunity from foreign criminal jurisdiction only in respect of acts performed in the exercise of official functions. However, this immunity is limited, since they may in any case be subject to criminal prosecution if the acts of which they are accused are crimes under international law, if they are performed exclusively to satisfy personal interests, or if they constitute an illegal appropriation of State property.[52]

IV. Preliminary issues

A. Sources

1. International treaties

27. International treaties were adopted on the basis of the draft articles prepared by the Commission: the 1961 Vienna Convention on Diplomatic Relations;[53] the 1963 Vienna Convention on Consular Relations;[54] the 1969 Convention on Special Missions;[55] the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[56] the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character;[57] and the 2004 United Nations

---

[49] At that time, in particular, the high-profile *Pinochet* case was under consideration in the United Kingdom of Great Britain and Northern Ireland.

[50] *Yearbook of the Institute of International Law*, vol. 69 (2000-2001), pp. 680-692. Rapporteur J. Verhoeven. Also available at www.idi-iil.org/idiE/resolutionsE/2001_van_02.en.pdf.

[51] "Article 2
In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.
Article 15
The Head of Government of a foreign State enjoys ... immunity from jurisdiction ... recognised, in this Resolution, to the Head of the State."

[52] "Article 13
... Nor does he or she enjoy immunity from jurisdiction, in criminal ... proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources."

[53] United Nations, *Treaty Series*, vol. 500, No. I-7310.

[54] Ibid., vol. 596, No. 8638.

[55] Ibid., vol. 1400, No. I-23431.

[56] Ibid., vol. 1035, No. 15410.

[57] Done in Vienna on 14 March 1975. Not yet in force. See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12).

Convention on Jurisdictional Immunities of States and Their Property.[58] These treaties contain provisions concerning the status of State officials and/or their immunity from foreign jurisdiction, sometimes reproducing verbatim the above-mentioned provisions of the draft articles prepared by the Commission.[59]

28. The subject of immunity of States' representatives is also dealt with in other international treaties. For example, there are corresponding articles in the treaties governing the privileges and immunities of international organizations in the territories of Member States or in the host State. Thus the immunity of representatives of States, including from criminal jurisdiction, is proclaimed in article IV of the 1946 Convention on the Privileges and Immunities of the United Nations;[60] article V of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies;[61] part IV of the 1949 General Agreement on Privileges and Immunities of the Council of Europe[62] and others. The immunities of consular officials, including from criminal jurisdiction, are governed by the provisions of bilateral consular conventions.[63]

29. One view held is that the question of immunity of State officials is also covered in certain international treaties which do not deal with immunity. For example, A. Borghi notes that "several conventions concerning the suppression of international crimes contain provisions precluding immunity of heads of State".[64] These are the treaties aimed at combating international crimes — in particular the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[65] and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[66] There is, however, another viewpoint. For example, J. Verhoeven considers that there is to date no treaty explicitly precluding the immunity normally applicable in a national court in cases of crimes under international law, whether for the State or the various State organs.[67] He further notes that there are admittedly conventions which try to organize effective suppression of such crimes. However, it seems that nobody finds in them any

---

[58] General Assembly resolution 59/38, annex. Not yet in force.

[59] At the concluding stage of work on the 2004 draft Convention on Jurisdictional Immunities of States and Their Property, a final understanding was reached that such immunity did not extend to criminal proceedings. This understanding was subsequently embodied in paragraph 2 of General Assembly resolution 59/38 of 2004, by which this Convention was adopted.

[60] General Assembly, resolution 22 A (I).

[61] General Assembly resolution 179 (II).

[62] CETS No. 002; available at http://conventions.coe.int.

[63] See, for example, section III (Privileges and immunities) of the Consular Convention between the Russian Federation and the Republic of Moldova of 14 June 1994. Text available at www.businesspravo.ru/Docum/DocumShow_DocumID_45519.html.

[64] A. Borghi, *L'immunité des dirigeants politiques en droit international*, Helbling & Lichtenhahn, 2003, p. 66.

[65] General Assembly resolution 250 A (III), annex.

[66] United Nations, *Treaty Series*, vol. 1465, No. 24841.

[67] J. Verhoeven, op. cit., p. 123. He states: "It must be ... observed, as has been pointed out, that these conventions (genocide, torture, etc.) contain no provision explicitly precluding it [immunity] and that there is nothing in their *travaux préparatoires* or elsewhere to indicate that this was the implicit wish of the States that negotiated them or became parties to them." Ibid., p. 125.

wish — implicit but definite — on the part of their signatories to derogate from immunity.[68]

2. Customary international law

30. Existing international treaties regulate important but separate aspects of the issue of immunity of certain categories of State officials from foreign criminal jurisdiction: immunity from the host State's and, in certain cases, the transit State's criminal jurisdiction of State officials performing diplomatic and consular functions (diplomatic agents and consular officials); immunity from the host State's criminal jurisdiction of States' representatives to international organizations; immunity from the host State's criminal jurisdiction of members of special missions. This shows that the group of persons enjoying immunity from foreign criminal jurisdiction is not limited to Heads of State. However, these treaties do not regulate questions of immunity of State officials from foreign criminal jurisdiction in general or as regards many specific situations or as regards the precise definition of the group of officials enjoying immunity, etc. There is no universal international treaty fully regulating all these issues and related issues of immunity of current and former State officials from foreign criminal jurisdiction. Moreover, not all the international treaties regulating this subject have entered into force,[69] and those which have entered into force are not noted for the broad participation in them of States.[70] It is noteworthy that certain provisions of these treaties actually state that the rules contained therein merely supplement existing international law in that area.[71] They thus confirm the existence here of customary international law. In addition, even though they codify individual aspects of customary international law as regards immunity of State officials from foreign criminal jurisdiction, the above-mentioned international treaties do not preclude the existence of relevant norms of customary international law, which continue to govern the subject under consideration.

---

[68] Ibid.

[69] For example, the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property have not entered into force.

[70] For example, 38 States are parties to the 1969 Convention on Special Missions.

[71] For example, article 21 of the 1969 Convention on Special Missions and article 50 of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

31. International custom is the basic source of international law in this sphere. As noted by H. Fox, "[i]n the absence of any general convention on the status and immunities of a head of State, the rules are provided by customary international law".[72] This is the situation with regard to immunity from foreign criminal jurisdiction not only for Heads of State but also for other State officials.

32. When determining the source of applicable law in the question of the immunity of the Minister for Foreign Affairs of the Democratic Republic of the Congo from the criminal jurisdiction of Belgium in the *Arrest Warrant* case, the International Court of Justice noted in its 2002 judgment, regarding the conventions on diplomatic relations, consular relations and special missions, which were among the instruments referred to by the parties: "These conventions provide useful guidance on certain aspects of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case."[73]

33. The fact that the source of immunity from foreign jurisdiction is customary international law is noted in rulings of national courts.[74] For example, in its 2001 ruling on the so-called "*Qaddafi* case", the French Court of Cassation stated: "In the

---

[72] H. Fox, *The Law of State Immunity* (New York: Oxford University Press, 2002), p. 426. See also A. Watts, "The legal position in international law of Heads of States, Heads of Government and Foreign Ministers", *Recueil des Cours*, vol. 247 (1994-III), p. 36; A. Borghi, op. cit., pp. 71 and 72; Y. Simbeye, *Immunity and International Criminal Law* (Aldershot, England and Burlington, Vermont: Ashgate, 2004), p. 94; M. A. Summers, "Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create a New Customary Rule in Congo v. Belgium?", *Michigan State Journal of International Law*, vol. 16 (2007), p. 459, at p. 466; H. Altman, "The Future of Head of State Immunity: the Case against Ariel Sharon", April 2002, p. 4 (available at www.indictsharon.net/heidialtman-apr02.pdf).

[73] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, *I.C.J. Reports 2002*, p. 21, para. 52.

[74] As A. Borghi notes, "... customary law is also established as the source of immunity in many judicial decisions, including in Switzerland, France, the United States and Germany". Op. cit., p. 71. See also *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ("Pinochet No. 1"), House of Lords, 25 November 1998, reproduced in *International Law Reports*, vol. 37, p. 1302, at pp. 1309-1311; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ("Pinochet No. 3"), House of Lords, 24 March 1999, reproduced in *International Law Review*, vol. 38, p. 581, at pp. 621, 622, 641 and 644; *Wei Ye, Hao Wang, Does, A, B, C, D, E, F, and others similarly situated v. Jiang Zemin and Falun Gong Control Office*, US District Court, Northern District of Illinois (2003), p. 5; *Bouzari v. Iran*, 2004, CanLII 871 (Court of Appeal for Ontario), paras. 40 and 85 (available at www.canlii.org/en/on/onca/doc/2004/2004canlii871/2004canlii871.pdf).

absence of contrary international provisions binding on the parties concerned, international custom precludes the institution of proceedings against incumbent heads of State before the criminal jurisdictions of a foreign State".[75]

34. States, in the person of their Executive, also refer to custom as the source of international law in this sphere. For example, the parties in *Arrest Warrant of 11 April 2000* (the Democratic Republic of the Congo and Belgium) largely substantiated their positions on whether the Congolese Minister for Foreign Affairs enjoyed immunity from the criminal jurisdiction of Belgium by references to customary international law.[76] In its "suggestions of immunity" to be submitted to United States courts considering cases involving the immunity of officials of foreign States, the United States Government refers to customary international law as a source of the law on immunity.[77] In his conclusions in the "*Qaddafi* case", the French Advocate General stated that "the principle of the immunity of Heads of State is traditionally regarded as a rule of international custom necessary for the preservation of friendly relations between States".[78]

---

[75] Court of Cassation, Criminal Chamber, 13 March 2001, 00-87.215, published in *Bulletin criminel*, 2001, No. 64, p. 218 (available at www.legifrance.com). Reprinted as *Gaddafi*, France, Court of Cassation, Criminal Chamber, 13 March 2001, *International Law Reports*, vol. 125, p. 508, at p. 509.

[76] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Application Instituting Proceedings, 17 October 2000, p.13, Part IV(B) (emphasis in the original): "[t]he *non-recognition* ... of the *immunity of a Minister for Foreign Affairs* in office is contrary to international case-law ..., to customary law and to international courtesy ..."; See also Democratic Republic of the Congo Memorial, paras. 6, 55 and 97(1); Belgian Counter-Memorial, paras. 3.4.6, 3.5.144, etc. (available at www.icj-cij.org).

[77] For example, in 2001 in its "suggestions of immunity" in *Tachiona v. Mugabe*, the State Department stated: "Under customary rules of international law recognized and applied in the United States, [...] President Mugabe, as the head of a foreign state, is immune from the court's jurisdiction in this case." *American Journal of International Law*, vol. 95 (October 2001), p. 874. In 2005, on the subject of the immunity of Pope Benedict XVI, the State Department noted: "The doctrine of head of state immunity is applied in the United States as a matter of customary international law". R. Crook, "Contemporary practice of the United States relating to international law: State jurisdiction and immunities: US Brief suggests Pope's immunity as a head of State", *American Journal of International Law*, vol. 100, (January 2006), p. 219. See also paragraph 3 of the "suggestions of immunity" posted on the website of the United States State Department (www.state.gov) in the cases of *Li Weixum v. Bo Xilai* ("further suggestion", cc. 2-8); *Hartmann v. Sheikh Zayed Bin Sultan Al-Nayhan: Gladys M. Lafontant v. Jean-Bertrand Aristide; First American Corporation v. Sheikh Zayed Bin Sultan Al-Nayhan; Josephine Alicog and Spiyani Marian Fernando v. Kingdom of Saudi Arabia, His Royal Highness King Fahd Bin Abdulaziz Al-Saud, Majid Afifi, Salim Afifi; Guardian F. v. Archdiocese of San Antonio.*

[78] *Gaddafi*, Submissions of the Advocate General, *International Law Reports*, vol. 125, p. 498, at p. 500.

3. International comity

35. The view has been expressed that immunity from foreign jurisdiction is granted not as a matter of right but as a matter of international comity.[79] However, this theory is difficult to accept. Immunity is above all a question of right, a question of the juridical rights and obligations of States. It is natural for disputes regarding immunity of State officials to be considered by the courts as disputes concerning violation of juridical rights and obligations. In *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* in 2006, which considered the questions of the immunity of the State and of its officials, Lord Hoffmann noted: "As Lord Millett said in *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573, 1588, state immunity is not 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another."[80] In its judgment in *Arrest Warrant*, the International Court of Justice found that Belgium had violated

---

[79] This theory is found both in judicial decisions and in doctrine. It is also well known in United States legal proceedings. For example, as long ago as 1812, the United States Supreme Court noted in its decision in *The Schooner Exchange v. McFaddon*: "... as a matter of comity, members of the international community had implicitly agreed to waive the exercise of the jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign". *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 137 (1812). In its decision of 11 March 1998 in *Flatow v. the Islamic Republic of Iran*, the Columbia District Court noted: "Foreign sovereign immunity, both under the common law and now under the FSIA, has always been a matter of grace and comity rather than a matter of right under United States law". 999 F.Supp. 1, U.S. District Court, District of Columbia (available at http://www.uniset.ca/islamicland/999FSupp1.html). In *Wei Ye, Hao Wang, Does, A,B,C,D,E,F, and others similarly situated v. Ziang Zemin and Falun Gong Control Office*, Counsel for petitioners stated that "immunity is accorded to heads of state as a matter of comity in recognition of the mutual need not to allow courts to interfere with the proper operations of foreign governments by imposing barriers and penalties upon visiting heads of state" (at p. 5).

Judge van Den Wyngaert, in his opinion dissenting from the judgment in the case *Concerning the Arrest Warrant of 11 April 2000*, also notes: "There is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international obligation." *I.C.J. Reports 2002*, p. 139, para. 1; also available at www.icj-cij.org. However, it will be recalled that the overwhelming majority of judges supported the opposite view in this matter.

As stated in *Oppenheim's International Law*, "the basis for the special treatment accorded to Heads of States is variously ascribed, inter alia, to the dictates of international comity and courtesy". R. Jenning and A. Watts, *Oppenheim's International Law*, 9th ed., 1992, p. 1034. L. M. Caplan writes: "Two leading rationales explain the legal source of the doctrine [of foreign state immunity]. One asserts that state immunity is a fundamental state right by virtue of the principle of sovereign equality. The other views state immunity as evolving from an exception to the principle of state jurisdiction, i.e., when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations." "State immunity, human rights, and *jus cogens*: a critique of the normative hierarchy theory", *American Journal of International Law*, vol. 97, No. 4 (October 2003), p. 741, at p. 748. It should be noted that a number of the cited opinions concerning comity speak of it not as a source but as one of the rationales for immunity.

[80] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia,* House of Lords, Appellate Committee, 14 June 2006 ("Jones No. 2"), [2006] UKHL 26, para. 101 (available at www.parliament.UK/).

an international legal obligation towards the Democratic Republic of the Congo, because the issue of an arrest warrant against Mr. Yerodia Ndombasi and its international circulation had failed to respect the immunity from criminal jurisdiction which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.[81] This case involved an obligation under customary international law. It is even more obvious that the immunity of officials from foreign criminal jurisdiction derives from international law in the case of relevant treaty obligations mentioned above.

36. However, firstly, nothing prevents a State from granting to officials of other States, and particularly to high-ranking officials, immunity from jurisdiction on the basis not only of obligations under international law but also of international comity.[82] Secondly, there is another issue involved. In both doctrine and practice, the issue sometimes arises of the immunity from foreign jurisdiction of members of the family or of the immediate entourage of senior officials. As regards this category, there are much more solid grounds for stating that the source of their immunity from foreign jurisdiction is not international law but international comity.[83] Finally, the view exists that, when senior State officials are travelling abroad not in an official but in a private capacity, the host State has no legal obligation to grant them immunity, but may in this case grant immunity out of comity.[84] (This issue will be considered in the section dealing with the extent of immunity.)

4. Role of international and domestic law

37. The question of the immunity of officials of foreign States is covered in the legislation of certain States. This basically concerns Heads of State. In the laws on the immunity of a foreign State adopted, for example, in the United Kingdom, Singapore, Pakistan, South Africa, Canada and Australia, the Head of a foreign State acting in an official capacity is, as is the case in the 2004 Convention on Jurisdictional Immunities of States and their Property,[85] included in the concept of a State.[86] In this connection, under United Kingdom legislation, the Head of a foreign

---

[81] *I.C.J. Reports 2002*, p. 33.

[82] "Whether conventional or customary, the obligation [to grant immunity] does not preclude national authorities granting to a foreign head of State a treatment more favourable than that imposed by international law ...". J. Verhoeven, "Les immunités de jurisdiction et d'exécution. Rapport provisoire (2000)", *Yearbook of the Institute of International Law*, vol. 69 (2000-2001), p. 509.

[83] See para. 128 below.

[84] According to A. Cassese, "[w]hen they [senior State officials] are on a private visit and are not travelling incognito, the host State is bound to afford them special protection; it may also grant them privileges and immunities out of comity, that is, politeness and good will; however, it is under no obligation to do so". *International Law* (Oxford, 2001), p. 96.

[85] General Assembly resolution 59/38, annex.

[86] See, for example, art. 14 of the State Immunity Act 1978, United Kingdom; art. 16 of the State Immunity Act 1979, Singapore; art. 15 of the State Immunity Ordinance 1981, Pakistan; art. 1 of the Foreign Sovereign Immunity Act 1981, South Africa; art. 2 of the State Immunity Act 1982, Canada; art. 3 of the Foreign States Immunities Act 1985, Australia. The relevant provisions of these acts are cited in E. K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Berlin-Heidelberg: Springer, 2005), pp. 431-459, and in A. Dickinson, R. Lindsay and J. Loonam, *State Immunity: Selected Materials and Commentary* (New York: Oxford University Press, 2004), pp. 469-523.

State acting in an official capacity enjoys the same immunity as the head of a diplomatic mission.[87] In accordance with article 36, paragraph 1, of the Foreign States Immunities Act of Australia, "[s]ubject to the succeeding provisions of this section, the Diplomatic Privileges and Immunities Act 1967 extends, with such modifications as are necessary, in relation to the person who is for the time being — (a) the head of a foreign State; or (b) a spouse of the head of a foreign State".[88]

38. The legislation of the Russian Federation contains provisions on the immunity of all officials of foreign States. In accordance with article 3, paragraph 2, of the Russian Code of Criminal Procedure, criminal proceedings against a foreign official enjoying immunity from such proceedings in accordance with the generally recognized rules of international law or with international treaties concluded by the Russian Federation may be instituted with the agreement of the foreign State whom the person is or was serving. In this connection, information as to whether the person concerned enjoys immunity from such criminal proceedings and on the extent of such immunity is provided to the relevant Russian court or law enforcement agency by the Ministry of Foreign Affairs of the Russian Federation.[89] In this case, it is noteworthy that it follows from domestic law that, as regards immunity of foreign officials from Russian criminal jurisdiction, international law prevails.

39. In connection with the appearance in certain States' legal systems of the institution of universal jurisdiction, provisions have started to appear in their legislation which can be interpreted as refusing immunity to foreign officials over whom the State in question exercises universal criminal jurisdiction. For example, the Belgian Law of 1993 concerning the criminal prosecution of grave violations of the 1949 Geneva Conventions on the protection of war victims was amended in 1999 to include a provision preventing the use of immunity as protection from criminal prosecution: "The immunity conferred by a person's official capacity does not prevent application of this Law."[90] This allowed criminal proceedings to be brought against the Minister for Foreign Affairs of the Democratic Republic of the Congo. However, after the International Court of Justice issued its judgment in the

[87] Article 20 of the State Immunity Act of the United Kingdom contains a reference to the Diplomatic Privileges Act of 1964. E. K. Bankas, op. cit., p. 440.

[88] A. Dickinson, R. Lindsay and J. Loonam, op. cit., at p. 483.

[89] See Federal Act No. 26 of 4 March 2008 on amendments to article 3 of the Code of Criminal Procedure of the Russian Federation. Available at http://document.kremlin.ru.

[90] Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of grave violations of international humanitarian law. Available at www.ulb.ac.be/droit/cdi/Site/Accueil/Accueil.html.

Arrest Warrant case, this Law was amended[91] in 2003 to read "... by setting aside immunities only as far as international law permits".[92] Thus the extent of immunity of foreign officials from criminal jurisdiction for war crimes under Belgian law in essence began to be determined on the basis of international law.

40. The respective roles played by international and domestic law in the consideration by national courts and other national law enforcement agencies of the question of immunity of officials of a foreign State mainly depend on the place occupied by international law in the legal system of the State concerned, on the legal culture there and on law and enforcement traditions. It is well known that national courts widely apply international law (combined, naturally, with domestic law) when considering questions of immunity of foreign officials and that national courts make practically no reference to international law when considering cases of this kind.

41. The question of immunity of State officials from foreign criminal jurisdiction, as well as the question of jurisdictional immunity of States, are matters concerning inter-State relations. For this reason, the basic primary source of law in this matter is international law. Ideally, therefore, international law on this matter should either determine the content of the domestic law applicable by national courts and other law enforcement agencies or be applied by them directly when they consider questions of immunity.[93] Ideally, domestic law should in this sphere play a subsidiary role, allowing implementation of the provisions of international law

---

[91] Law of 5 August 2003 pertaining to serious violations of international humanitarian law, available at www.juridat.be/:
Article 13
The following article 1 bis is inserted in chapter I of the Preliminary Title of the Code of Criminal Procedure:
"Article 1 bis. 1. In accordance with international law, proceedings may not be brought against:
– Heads of State, Heads of Government and ministers for foreign affairs while in office, and other persons with immunity recognized by international law;
– persons who enjoy full or partial immunity on the basis of a treaty binding on Belgium.
2. In accordance with international law, no restraining measure related to the institution of public proceedings may be imposed during their stay on any persons officially invited to stay in the territory of the Kingdom by the Belgian authorities or by an international organization based in Belgium with which Belgium has concluded a headquarters agreement."

[92] S. Smis and K. Van der Borght, "Belgian law concerning the punishment of grave breaches of international humanitarian law: a contested law with uncontested objectives", *American Society of International Law Insights*, July 2003, available at: www.asil.org/insights/insigh112.htm.

[93] Mention may be made, in this connection, of the situation in France described by R. Abraham, the Agent of the French Republic, during the hearings in the International Court on the case *Certain Criminal Proceedings in France* (*Republic of the Congo v. France*): "In conformity with international law, French law embodies the principle of the immunity of foreign Heads of State. There are no written rules deriving from any legislation relating to the immunities of State and their representatives. It is the jurisprudence of the French courts which, referring to customary international law and applying it directly, have asserted clearly and forcefully the principle of these immunities." Document CR 2003/21 (translation), Monday 28 April 2003 at 4 p.m., para. 32.

regulating the question of immunity.[94] Since national courts often have difficulty determining the content of the customary rules of international law that should be applied, codification of international law in this matter would be most useful.

5. Material to be used

42. In research on the topic under consideration and in the possible formulation of relevant draft normative provisions, it would be advisable to use the following material: State practice, including domestic legislation, national court rulings, particularly those issued at the turn of the century, reflecting current understanding of the topic; presentations of the Executive in national and international judicial organs, statements by representatives of States on this issue; international treaties relating to the topic; judgments and other documents of the International Court, particularly in the *Arrest Warrant* case and the current cases *Certain Criminal Proceedings in France* (*Republic of the Congo v. France*) and *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*); relevant decisions of international criminal tribunals; material of the Commission, as mentioned above, and also other material on the topic; material on the consideration of the question of immunity of Heads of State and Heads of Government by the Institute of International Law in the period 1997-2001; academic research in this area; and other material on the topic.[95]

B. Immunity and jurisdiction

1. Jurisdiction

43. The very title of the topic under consideration presupposes that there are similarities and differences between the concepts of "immunity" and "jurisdiction". As noted in a joint separate opinion by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, "'Immunity' is the common shorthand phrase for 'immunity from jurisdiction'."[96] Jurisdiction precedes immunity. If there is no jurisdiction, there is no reason to raise or consider the question of immunity from jurisdiction.[97] In the judgment in *Arrest Warrant*, the International Court of Justice

---

[94] As J. Verhoeven notes, "There would seem to be no doubt that immunity primarily raises a question of international law and that it is therefore international law which should regulate the problems raised by immunity. And it is domestic law which should determine how this rule is actually respected in each internal legal order, in the knowledge that, as in other areas, the international responsibility of the State is incurred in the event of any shortcomings." "Les immunités propres aux organes ou autres agents des sujets de droit international", in: J. Verhoeven (ed.), *Le droit international des immunités: contestation ou consolidation?* (Brussels: Larcier, 2004), at p. 82.

[95] For example, INTERPOL appeals to States to circulate international arrest warrants for foreign officials.

[96] *I.C.J. Reports 2002*, p. 64, para. 3.

[97] As J. Brohmer notes, "the question of jurisdiction logically precedes that of sovereign immunity, because if there is no jurisdiction the question of immunity cannot arise." *State Immunity and the Violations of Human Rights* (The Hague: Kluwer Law International, 1997), p. 34. "Before one can analyze whether or not immunity is a viable defense, the establishment of jurisdiction ... is necessary. Jurisdiction must be established first because, by definition, immunity is shorthand for immunity from jurisdiction." P. J. Toner, "Competing concepts of immunity: revolution of the Head of State immunity defense", *Penn State Law Review*, vol. 108 (2004), p. 903.

states that "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".[98]

44. The topic under consideration concerns national and not international jurisdiction, i.e. the jurisdiction of a State and not the jurisdiction of international organs. According to M. Shaw, "jurisdiction concerns the power of the state to affect people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs".[99] Jurisdiction is often described as the authority or competence of a State.[100] Jurisdiction is a manifestation of the sovereignty of the State[101] and of its authoritative prerogatives, especially in the territory over which that State exercises sovereignty. Igor I. Lukashuk noted that jurisdiction "means the authority of the State to prescribe behaviour and to ensure that its prescriptions are carried out using all lawful means at its disposal".[102] I. Brownlie notes that "at least as a presumption, jurisdiction is territorial".[103] However, jurisdiction may also be exercised on other grounds (such as citizenship[104]) and may be extraterritorial.

45. Jurisdiction is exercised through the actions of the branches of government — legislative, executive and judicial. Usually a distinction is drawn between legislative, executive and judicial jurisdiction.[105] Legislative or prescriptive (law-

---

[98] *I.C.J. Reports 2002*, p. 20, para. 46. The same idea was expressed by the then President, Judge G. Guillaume: "... a court's jurisdiction is a question which it must decide before considering the immunity of those before it. In other words, there can only be immunity from jurisdiction where there is jurisdiction." Ibid., p. 36, para. 1. This view is also shared by Judges Higgins, Kooijmans and Buergenthal in their joint special opinion: "If there is no jurisdiction en principe, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise." Ibid., p. 64, para. 3.

[99] M. Shaw, *International Law*, fifth ed. (Cambridge University Press, 2003), p. 572.

[100] "*Juridiction*" — "*Terme évoquant le concept de pouvoir, utilisé dans une série d'expressions comme competence et dans une autre série d'expressions relatives comme pouvoir de juger*". J. Salmon (dir.), *Dictionnaire de droit international public* (Brussels: Bruylant, 2001), p. 624. According to V. Lowe, "'jurisdiction' is the term that describes the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply and enforce rules of conduct upon persons." "Jurisdiction", in M. D. Evans (ed.), *International Law*, 2nd ed. (Oxford University Press, 2006), p. 335. H. B. Oxman is of the view that "in its broadest sense, the jurisdiction of a State refers to its lawful power to act and hence to its power to decide whether and, if so, how to act. While lawyers frequently use the term 'jurisdiction' more narrowly to refer to the lawful power to make and enforce rules, it is useful to bear in mind the broadest meaning". "Jurisdiction of States", *Encyclopedia of Public International Law*, vol. I. (Amsterdam: Elsevier Sciences Publishers, 1992), p. 55.

[101] D. W. Bowett, "Jurisdiction: changing patterns of authority over activities and resources", *British Year Book of International Law*, vol. 53 (1982), No. 1. "Юрисдикция государства (или национальная юрисдикция) – проявление суверенитета государства". ["Jurisdiction of the State (or national jurisdiction) as a manifestation of State sovereignty"] Chernichenko, S. V., Теория международного права [Theory of international law], vol. 2 (Moscow: Independent Institute of International Law, 1999), p. 126.

[102] I. I. Lukashin, *International law. General section*, Third edition (Wolters Kluwer, 2007), pp. 330 and 331.

[103] I. Brownlie, *International Law*, sixth ed. (Oxford University Press, 2003), p. 297. As Igor I. Lukashuk points out, the basic principle of jurisdiction is territorial. However, the scope of jurisdiction may be both territorial and extraterritorial. Op. cit.

[104] M. Shaw, op. cit., p. 572.

[105] Ibid., pp. 576-578; I. I. Lukashuk, op. cit.

making) jurisdiction consists of the promulgation by government authorities of laws and other legal prescriptions. Executive jurisdiction consists of actions by the State, its executive authorities and officials in execution of and enforcement of its laws and other legal prescriptions. Judicial jurisdiction consists of the activity of its judicial authorities, primarily in consideration of cases. Executive and judicial jurisdiction have common features: both involve the application and enforcement of the law. This is why some authors mention the existence of only two types of jurisdiction — legislative (prescriptive) and executive.[106]

46. In his second report on the jurisdictional immunities of States and their property, the Special Rapporteur, S. Sucharitkul, proposed the following definition of jurisdiction: "'Jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects" (draft article 2, paragraph 1 (g)). This definition was amplified by the draft interpretative provisions clarifying the elements in the concept of "jurisdiction":

> Article 3. Interpretative provisions
>
> 1. In the context of the present articles, unless otherwise provided, ...
>
> (b) the expression "jurisdiction", as defined in article 2, paragraph 1 (g), ... includes:
>
> (i) the power to adjudicate,
>
> (ii) the power to determine questions of law and of fact,
>
> (iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and
>
> (iv) such other administrative and executive powers as are normally exercised by the judicial or administrative and police authorities of the territorial State.[107]

47. Two conclusions may be drawn from this definition and from the interpretative provisions. Firstly, for the purpose of the draft articles on jurisdictional immunities of States, the Special Rapporteur thought it advisable to consider jurisdiction only in its executive and judicial aspect. Legislative (prescriptive) jurisdiction is not covered by this definition. Secondly, for the purpose of the articles, the concept of jurisdiction covers the entire spectrum of procedural actions.[108]

2. Criminal jurisdiction

48. Jurisdiction can be divided into civil, administrative and criminal jurisdiction, depending on the substance of the laws (orders) issued by the authorities, the acts performed by the authorities, and the questions or cases governed by the orders or under consideration by the authorities. Criminal jurisdiction involves the adoption

---

[106] See, for example, S. V. Chernichenko, op. cit., pp. 112-117.

[107] *Yearbook ... 1980*, vol. II (Part One), pp. 206 and 211.

[108] As the Special Rapporteur himself noted, explaining the draft definition, for the purpose of the draft articles the concept of jurisdiction "covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgements and execution of the judgements thus rendered, or their suspension and further exemption". Ibid., p. 206.

of laws and other orders that criminalize the acts of individuals and establish and enforce their responsibility for those acts, and the activity of government bodies in implementing the laws and orders.[109] It is noteworthy that judicial bodies, some executive bodies and some bodies which are not part of the executive or the judiciary may be responsible for applying and enforcing criminal law — that is, they exercise the executive or executive and judicial criminal jurisdiction of the State. The legal system of the State determines which government and judicial authorities are involved in the exercise of criminal jurisdiction.[110] The rules of domestic law that criminalize specific acts of individuals and establish responsibility for such acts are the substantive criminal law rules. The rules establishing the practice and procedures for implementation of the substantive rules of criminal law are the rules of procedural criminal law. In general, the activity of the government authorities, governed by the rules of criminal procedural law, to apply or enforce the rules of substantive criminal law relates to criminal proceedings and is included in the concept of criminal procedure.

49. As mentioned above, jurisdiction is basically territorial, but may be exterritorial, especially in the case of criminal jurisdiction. A State may extend its criminal jurisdiction beyond the borders of its own territory in a number of cases: (a) in relation to acts which are criminal under its law and are committed abroad by one of its citizens; (b) in relation to acts committed abroad which are criminal under its law and injure one of its citizens; (c) in relation to acts committed abroad which are criminal under its law and injure the State; and (d) in relation to acts committed abroad which are crimes under international law. Example (a) refers to the "active personality" principle of exterritorial criminal jurisdiction; (b) refers to the "passive personality" principle (sometimes these two forms are combined into one form of exterritorial criminal jurisdiction referred to as "personal jurisdiction"); (c) refers to the "protective" principle; and (d) refers to the "universal" principle.[111]

50. The question of immunity of an official may arise during the exercise by a foreign State of territorial criminal jurisdiction or of passive personality, protective or universal exterritorial criminal jurisdiction. The question of immunity may also arise in a case where several States try to exercise criminal jurisdiction in relation to the same individual.

3. Criminal jurisdiction and civil jurisdiction

51. In contrast to civil executive jurisdiction and civil procedure, criminal executive jurisdiction and criminal procedure may begin long before the actual trial phase. Criminal prosecution includes a substantial pre-trial phase. A significant number of criminal procedure actions take place after law enforcement agencies receive a report of the (alleged) crime and before the case goes to trial. The actions of the police and other law enforcement agencies in the preliminary investigation, such as drafting reports on the inspection of the crime scene, collection of material

---

[109] "La compétence pénale étatique au sens large peut s'entendre tant de la compétence de la loi pénale de fond applicable, qui incrimine et sanctionne, que de la détermination de l'ordre juridictionnel répressif chargé de l'application des textes pénaux." A. Fournier, "Compétence pénale", *Encyclopédie Dalloz. Répertoire de droit international*, 1998, p. 1.

[110] In the Russian Federation, for example, the courts and internal affairs authorities are responsible for law enforcement, but some of these functions are performed by the Procurator's offices, which are not part of the Executive.

[111] See notes 22 to 26 of the memorandum by the Secretariat on the immunity of State officials from foreign criminal jurisdiction, (A/CN.4/596).

evidence, interrogation of witnesses, institution of criminal proceedings and so on, do not require or at least in many countries may not require judicial decisions. Such actions may affect a foreign official. Accordingly, the exercise of criminal jurisdiction may already raise the question of immunity from it in this pre-trial phase. This is important for defining the boundaries of the topic under consideration and the extent of immunity.

52. Civil jurisdiction may be exercised both in relation to individuals and in relation to a State. Yet according to the 2004 Convention on Jurisdictional Immunities of States and Their Property, for instance, institution of a civil suit against a State representative who is acting in that capacity constitutes institution of a suit against the State.[112] Accordingly, consideration of such a suit by the court amounts to exercise of civil jurisdiction over a State.

53. Criminal jurisdiction is exercised only over individuals and not over the State. A State, unlike an individual, does not incur criminal responsibility. As noted by Lord Bingham of Cornhill in the 2006 decision on *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (*the Kingdom of Saudi Arabia*), indicating the difference between criminal and civil jurisdictions, "a state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal prosecution".[113] An important element of this opinion is the word "directly". It is clear that the exercise of criminal jurisdiction over a State official, even indirectly, affects the State which that official serves. This is particularly clear in the case of a criminal prosecution of high-ranking State officials, especially a Head of State or Government, minister for foreign affairs or other members of a government who represent the State in international affairs and/or perform critical functions for the State in connection with ensuring its sovereignty and security. It is also apparent in a situation where the criminal prosecution of a State official at any level is connected with acts performed by him in an official capacity. As noted in a 2004 decision in *Ronald Grant Jones and others v. The Ministry of the Interior Al-Mamlaka Al-Arabiya AS Saudiya* (*The Kingdom of Saudi Arabia*) *& Anor.*, "criminal proceedings against an alleged torturer may be said indirectly to implead the foreign state. It is not easy to see why civil proceedings against an alleged individual torturer should be regarded as involving any greater interference in or a more objectionable form of adjudication

[112] This follows from the definition of the term "State" for the purposes of the Convention. According to article 2, para. 1(b) (iv), of the Convention, the meaning of "State" includes "representatives of the State acting in that capacity" and according to article 6, para. 2(b), "a proceeding before a court of a State shall be considered to have been instituted against another State if that other State ... is not named as a party to the proceeding but the proceeding in effect seeks to effect the property, rights, interest or activities of that other State".

[113] Jones No. 2 (see note 80 above), para. 31.

upon the internal affairs of a foreign state".[114] Moreover, it is highly likely that a State conducting a criminal investigation of an official of a foreign State will gain access to information relating to the sovereignty and security of the State served by the official. In these situations, although legally this concerns criminal prosecution of physical persons, it essentially concerns the exercise of sovereign prerogatives of one State in relation to another. At the same time, the sovereign interests of the other State are affected. In the exercise of criminal jurisdiction, which often involves extremely intrusive actions of investigation, these sovereign interests may be affected to a much greater degree than in the exercise of civil jurisdiction. As noted in the decision of the Federal Court of Switzerland in *Adamov*, "In accordance with the general principles of international law a domestic criminal justice system should avoid intervening in the affairs of other states."[115]

54. Finally, there are some situations where criminal and civil jurisdiction are not so easily distinguished. In some legal systems, for instance, a civil action may be initiated in the context of a criminal proceeding.[116]

55. On the whole, although at first glance there seems to be a clear distinction between exercising criminal and civil jurisdiction over officials of a foreign State, they do have enough features in common for consideration of the topic to take into account existing practice in relation to immunity of State officials and of the State itself from foreign civil jurisdiction.

4. Immunity

56. A State is entitled to exercise jurisdiction, including criminal jurisdiction, over all individuals in its territory, except when the individual in question enjoys immunity.[117] There are no definitions of the concept of immunity, at least not in universal international agreements, although they often employ the term. Immunity is usually understood to be the exception or exclusion of the entity, individual, or property enjoying it from the jurisdiction of the State; an obstacle to the exercise of jurisdiction; limitation of jurisdiction; a defence used to prevent the exercise of jurisdiction over the entity, individual or property; and, finally, the right for

---

[114] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, Court of Appeal, 28 October 2004 ("Jones No. 1"), [2004] EWCA Civ 1394, para. 75.

[115] *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal, Switzerland, Judgment of 22 December 2005, ATF 132 II 81, para. 3.4.3.

[116] In accordance with the Code of Criminal Procedure of the Russian Federation, art. 44, para. 2, "a civil claim may be presented after the institution of criminal proceedings and before the completion of the investigation in court, when the criminal case is tried by a court of first instance".

[117] See paragraph 7 above in connection with article 2 of the draft Declaration on Rights and Duties of States prepared by the Commission.

jurisdiction not to be exercised over the entity, individual or property, that is, the right not to be subject to jurisdiction.[118]

57. In the second report on the jurisdictional immunities of States and their property, the Special Rapporteur suggested the following definitions of the terms "immunity" and "jurisdictional immunities" in draft article 2, paragraph 1: "(a) 'immunity' means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State; (b) 'jurisdictional immunities' means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State."[119] As the Special Rapporteur noted in his introduction to the draft articles: "'Immunity' is a legal concept which can be expressed in terms of jural relationship"; "'immunity' to which a person ... or State is entitled is correlated to 'no power' on the part of the corresponding authority"; "the expression 'immunity' connotes the non-existence of power or non-amenability to the jurisdiction of the national authorities of a territorial State."[120]

58. It is very clear from this definition of "immunity" and from the commentary of S. Sucharitkul that, although he defines immunity as a jural relationship, the right of the person entitled to immunity in this jural relationship does not correspond to any duty of the foreign State (the only element corresponding to the right is non-amenability to jurisdiction). Yet in a jural relationship the right of one individual corresponds to the duty of another or of others. Immunity in this sense is no exception. If immunity from jurisdiction is considered as a rule of law (together

---

[118] For example, K. Stefko understood immunity to mean "exemption from the jurisdiction of local authorities". *Diplomatic Exemption from Civil Jurisdiction* (Lwow, 1938), p. 30 (in Polish), cited in F. Przetacznik, *Protection of Officials of Foreign States according to International Law* (Hague-Boston-London, 1983), p. 10. The *Dictionnaire de droit international public*, gives the following definition of immunity: "Exemption faisant échapper les personnes, les engins ou les biens qui en bénéficient (Etats, chefs d'Etats, agents diplomatiques, fonctionnaires consulaires, organisations internationales et leurs agents, forces militaires étrangères, navires et aéronefs d'Etat, et jadis les étrangers en pays de capitulation) à des procédures ou à des obligations relevant du droit commun". J. Salmon (dir.), *Dictionnaire de droit international public* (Brussels: Bruyland, 2001), p. 558. Immunity from jurisdiction, as defined in this dictionary, is an "exemption qui permet à certaines entités et personnes (Etats, chefs d'Etats, agents diplomatiques, fonctionnaires consulaires, organisations internationales et leurs agents, forces militaires étrangères, etc.) d'échapper à l'action des juridictions de l'Etat de séjour ou d'Etat tiers." Ibid., p. 559. As noted by C. Kessedjian, the concept of immunity from jurisdiction consists of "empêcher qu'un Etat ou une organisation internationale soient poursuivis devant une juridiction d'un autre Etat". "Immunité", *Encyclopédie Dalloz. Répertoire de droit international*, 1998, p. 5. According to H. Steinberger, "In the context of public international law the law of State immunity means the legal principles and rules under which a foreign State may claim exemption from, suspension of, or non-amenability to the jurisdiction of another State." "State immunity", in *Encyclopedia of public international law*, vol. 4 Amsterdam, 2000, p. 615. S. Wirth considers that "state immunity is the right not to be submitted to the exercise of foreign jurisdiction". "Immunity for core crimes? The I.C.J.'s Judgment in the Congo v. Belgium Case", *European Journal of International Law*, vol. 13, No. 4 (2002), p. 882. According to I. O. Khlestova, "иммунитет государства предполагает неподчинение его юрисдикции другого государства" [immunity of a State implies that it is not subject to the jurisdiction of another State]. Проблемы юрисдикционного иммунитета иностранного государства (законодательство и практика) [Problems of the jurisdictional immunity of a foreign State (legislation and practice)], Moscow, 2002, p. 9.

[119] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/331 and Add.1, para. 33.

[120] Ibid., para. 17.

with the jural relationship corresponding to this rule) which establishes a right and a corresponding duty, as seems to be the case, then on the one hand there is a right for the State's jurisdiction not to be exercised over the person enjoying immunity, while on the other hand there is a duty of the State that has jurisdiction not to exercise it over the person enjoying immunity.[121]

59. There is another view of immunity. It is also seen as a derogation from the jurisdiction of the host State for the foreign official. This concept of immunity emphasizes not the right of the individual enjoying immunity and the corresponding duty of the State that has jurisdiction but the agreement or willingness of the State that has territorial jurisdiction, out of respect for the other State and accordingly for its representatives, not to exercise this jurisdiction in relation to the other State. In essence, this understanding of immunity is based not on international law but on international comity.[122] If this concept is applied in its pure form, immunity becomes not a question of right but a question of the discretionary powers of the State with jurisdiction. However, in practice this concept is not applied in this distilled sense. Rather it is understood as being complementary to the interpretation and rationale of immunity international law. As noted by M. Shaw, "[a]lthough constituting a derogation from the host State's jurisdiction, in that, for example, the UK cannot exercise jurisdiction over foreign ambassadors within its territory, it is to be construed nevertheless as an essential part of the recognition of the sovereignty of foreign states, as well as an aspect of the legal equality of all states".[123]

60. Neither the draft articles adopted by the Commission nor the 2004 Convention on Jurisdictional Immunities of States and Their Property contain definitions of the terms "immunity" and "jurisdiction" and corresponding interpretative provisions. Yet they do to a large extent reflect generally accepted ideas about the content of the concepts of "immunity" and "jurisdiction". An attempt should perhaps be made to develop a definition of the terms "immunity" and/or "immunity from criminal jurisdiction" in the context of the topic under consideration, if normative provisions are to be drafted.

61. Despite the interrelationship of immunity and jurisdiction and the fact that the development of the institution of exterritorial and, in particular, universal jurisdiction has had a significant influence on thinking on immunity, the issue of immunity may be considered and studied without consideration of the substance of the question of jurisdiction as such, and vice versa. As indicated by the International Court of Justice in the judgment in *Arrest Warrant*, "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing

---

[121] According to I. Sinclair, "immunity can be defined jurisprudentially as the correlative of a duty imposed upon the territorial State to refrain from exercising its jurisdiction over a foreign State". "The law of sovereign immunity: recent developments", *Recueil des Cours*, vol. 167 (1980-II), p. 113, at p. 199.

[122] See paras. 35 and 36 above.

[123] Op. cit., p. 621. S. Sucharitkul also writes: "Reciprocity of treatment, comity of nations and courtoisie internationale are very closely allied notions, which may be said to have afforded a subsidiary or additional basis for the doctrine of sovereign immunity." "Immunities of foreign States before national authorities", *Recueil des Cours*, vol. 149 (1976-I), p. 119.

jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law ... These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions".[124]

62. In their joint separate opinion in the judgment in *Arrest Warrant*, Judges Higgins, Kooijmans and Buergenthal noted that "immunity" and "jurisdiction" were inextricably linked and that whether there was immunity in any given instance depended not only on the status of the individual but on the type of jurisdiction and on what basis the State authorities sought to assert it.[125] They also noted that "while the notion of 'immunity' depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each" and that the Court, in bypassing the issue of jurisdiction, "has encouraged a regrettable current tendency ... to conflate the two issues".[126]

63. In the context of this topic, there will be a need to consider the issue of the immunity of State officials from foreign criminal jurisdiction and perhaps to formulate draft articles or guiding principles on this issue. The Special Rapporteur did not consider it appropriate in this connection to consider further the substance of the issue of jurisdiction per se, or the issue of exterritorial and universal criminal jurisdiction in particular. There thus seems to be no need to formulate any draft provisions concerning jurisdiction in the context of this topic. At the same time, the issue of jurisdiction will clearly have to be taken up when considering the question of the extent of immunity, including whether there are any exemptions from or exceptions to the rule on immunity.

5. Immunity from criminal jurisdiction and its procedural nature

64. The above views on immunity and jurisdiction are also relevant to the consideration, in the context of this topic, of the concept "immunity from criminal jurisdiction". It is important that immunity from jurisdiction, and particularly immunity from criminal jurisdiction, does not remove the individual who enjoys it from the legislative (prescriptive) jurisdiction of the State. It is noteworthy that the definition of immunity from jurisdiction proposed by S. Sucharitkul spoke of immunity from the jurisdiction only of judicial and administrative authorities. In view of the above-mentioned draft definition of the concept of "jurisdiction" for the articles on jurisdictional immunities of States and their property, it is clear that the reference was to immunity only from the executive and judicial jurisdiction and not from the legislative (prescriptive) jurisdiction of the State, i.e. immunity from

[124] *I.C.J. Reports 2002*, pp. 24 and 25, para. 59.
[125] *I.C.J. Reports 2002*, p. 64, para. 3.
[126] Ibid., para. 4.

process, from procedural actions.[127] Thus the person enjoying immunity is not exempt from the law established by the State possessing jurisdiction (the law applicable in the territory of that State).[128] However, the State possessing jurisdiction cannot guarantee that its law will be applied to the person enjoying immunity. For the person who enjoys it, immunity provides protection from the law enforcement process in the State from whose jurisdiction immunity exists but not from the law of that State. This view is widely supported by doctrine.[129] It is noteworthy that the conventions on diplomatic and consular relations and on special missions, while granting to a specific category of individuals immunity from the jurisdiction of the host State, at the same time establish the obligation of such individuals to respect the laws of that State.[130]

65. It should be noted that there is also another viewpoint regarding the nature of immunity. Reference is sometimes made not only to procedural but also to substantive or material immunity, whereby a person enjoying immunity may not be

---

[127] S. Sucharitkul wrote: "The immunities under consideration [immunities of foreign States before national authorities] are mainly from jurisdiction or from the exercise of local power or territorial authority, and not immunities from substantive law or essential legal provisions. They are immunities from the procedural laws, or at best from legal process or from suit, but not from local laws. When State immunity is invoked, local jurisdiction may be suspended. But the same immunity can at any time be waived in many different ways, whereby enabling the legal process to proceed with complete resumption of the operation of substantive local law." Op. cit., p. 96.

[128] "Immunity from jurisdiction does not amount to an exemption from the legal order of the territorial State. The question may arise as a prejudicial matter in proceedings in which the foreign State is not engaged, or before the courts of third State who by their rules regarding conflict of laws may have to apply the substantive law of the (first) territorial State, e.g. the lex loci delicti commissi." H. Steinberger, op. cit., p. 616.

[129] For example, "The term immunity is employed primarily to denote exemption from legal process. As such, an immunity does not imply or involve non-amenability to or non-liability ratione materiae, as must be clear when it is appreciated that an immunity may be invariably waived" (Parry and Grant, *Encyclopaedic Dictionary of International Law*, New York-London, Rome, 1986, p. 165); "... immunity from jurisdiction does not mean exemption from the legal system of the territorial state in question" M. N. Shaw, op. cit., p. 623); "The plea [of immunity] is one of immunity from suit, not of exemption from law. Hence if immunity is waived the case can be decided by the application of the law in the ordinary way. The underlying liability or State responsibility of the defendant State is unaffected though, as will be seen where no remedy is available in a court of the defendant State, the immunity from the suit may enable liability to be avoided" H. Fox, "International law and restraints on the exercise of jurisdiction by national courts of States", in M. D. Evans (ed.), *International Law*, Oxford University Press, 2006, 2nd ed., p. 363); "State immunity under international law is no more than immunity from legal proceedings before domestic courts, and it does not make states immune either from their own legal proceedings or from any sort of responsibility. In other words, to grant state immunity prescribed by international law does not mean the end of the rule of law" (M. Tomonori, "The individual as beneficiary of State immunity: problems of the attribution of ultra vires conduct", *Denver Journal of International Law and Policy*, vol. 29 (Summer/Fall, 2001), p. 261, at p. 274).

[130] Article 41 of the 1961 Vienna Convention on Diplomatic Relations, article 55 of the 1963 Vienna Convention on Consular Relations, and article 47 of the 1969 Convention on Special Missions. The preamble to the 2001 resolution of the Institute of International Law (see note 50 above) also mentions that "immunities afforded to a Head of State or Head of Government in no way imply that he or she is not under obligation to respect the law in force on the territory of the forum".

subject to the laws and thus to the legislative jurisdiction of a State.[131] However, this view is not shared by the majority of authors writing on this question.

66. This is especially important as regards the scope of criminal jurisdiction. In particular, an individual enjoying immunity from criminal jurisdiction is not exempt from the rules of substantive law criminalizing a particular act and establishing the punishment for it. Immunity from foreign criminal jurisdiction protects that individual only from criminal process and criminal procedure actions by judicial and law enforcement agencies of the foreign State possessing jurisdiction. (It might be more accurate to speak not of immunity of State officials from foreign criminal jurisdiction or criminal process but of immunity from certain measures of criminal procedure and from criminal proceedings by the foreign State. However, this question cannot be answered until the question of the extent of immunity has been considered.) Thus immunity from foreign criminal jurisdiction falls within the area of procedural and not substantive law and is procedural in nature.[132] Accordingly, the person enjoying immunity is in principle not exonerated from criminal responsibility; it is simply that it is more difficult to invoke such responsibility. As the International Court emphasized in its judgment in the *Arrest Warrant* case, "the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed ... . Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."[133]

67. The question of the immunity of an official may arise already at an early stage of the criminal process, even before the criminal case has been transmitted to the court for substantive consideration. For example, in the *Case concerning certain criminal proceedings in France (Republic of the Congo v. France)*, currently under consideration by the International Court of Justice, the Congo is disputing (and referring, inter alia, to the immunity of the Head of State from foreign criminal jurisdiction) the legality of certain criminal procedure measures against a number of Congolese officials, including the head of State, taken by France at the preliminary stage of the investigation and criminal proceedings relating to crimes allegedly committed in the Congo.[134] The legality of similar measures taken by France against certain Djibouti officials, including the Head of State, is also disputed in the other

---

[131] See, for example, B. Stern, "Immunités et doctrine de l'Act of State: Différences théoriques et similitudes pratiques de deux modes de protection des chefs d'État devant les juridictions étrangères", *Journal de droit international*, No. 133 (1) (Jan./Feb./March 2006), p. 63, at p. 64. "In international law state immunity refers to the legal rules and principles determining the conditions under which a foreign state may claim freedom from the jurisdiction (the legislative, judicial and administrative powers) of another state (often called the 'forum state')." P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised ed., London and New York, 1997, p. 118; I. O. Khlestova, op. cit., p. 9.

[132] In the Russian Federation, for example, a provision on immunity of officials of a foreign State from measures of criminal procedure is contained in the Code of Criminal Procedure, which governs the criminal process, and not in the Criminal Code, which contains rules of substantive criminal law.

[133] *I.C.J. Reports 2002*, p. 25, para. 60.

[134] *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, www.icj-cij.org.

case currently being considered by the Court, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.[135] In the *Pinochet* case, the question of immunity of a former Head of State from the criminal jurisdiction of the United Kingdom arose in connection with the consideration of Spain's request for his extradition.[136] In the *Adamov* case, the question of immunity from foreign criminal jurisdiction of the former Minister for Energy Atomic of the Russian Federation also arose in the context of the consideration of the question of his extradition to a third State.[137]

68. When a national court begins to try a criminal case, the question of immunity is considered as a preliminary issue, before the court considers the case on its merits.[138] As the International Court of Justice stated in its advisory opinion in the case *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, national courts must consider the question of immunity from jurisdictional process "as a preliminary issue to be expeditiously decided *in limine litis*".[139]

69. In addition, the State served by the official concerned often raises a general objection both to consideration of the question of immunity in a foreign court and to other non-judicial criminal procedure measures that the foreign State tries to apply or applies to the official. In such cases, the State served by the official usually makes diplomatic approaches to the foreign State that is applying criminal procedure measures, pointing to the need to respect the immunity of its official, or even raises the issue of the responsibility of that foreign State for violation of obligations arising from the rules of international law on immunity. This is because, as has already been remarked, the question of immunity of State officials from foreign criminal jurisdiction is a question of inter-State relations and the right to immunity and the corresponding duty to respect immunity and to refrain from exercising jurisdiction over the person enjoying immunity are derived primarily from the rules of international law.

70. The exercise of criminal jurisdiction also includes the adoption of interim measures of protection or measures of execution. Some international legal

---

[135] *Certain Questions of Mutual Assistance in Criminal Matters, (Djibouti v. France)*, www.icj-cij.org.

[136] In October-November 1998, after the Supreme Court of Spain had ruled that the Spanish courts had jurisdiction in respect of Augusto Pinochet, the Spanish judicial authorities issued an international arrest warrant for the Senator and requested his extradition to Spain. In accordance with these orders and the 1989 Extradition Act, on 16 and 23 October 1998 the Metropolitan Stipendiary Magistrate issued two preliminary arrest warrants for the former Chilean dictator. See *International Legal Materials*, vol. 37 (1998), pp. 1302 and 1303 and vol. 38 (1999), p. 432.

[137] In May 2005, the former Minister for Energy Atomic of the Russian Federation, E. Adamov, was arrested in Bern at the request of the United States and placed in preventive detention with a view to his subsequent extradition to the United States. The American authorities accused him of a series of financial crimes, including the large-scale misappropriation and use for personal ends of money allocated for Russian nuclear energy projects. The Russian Federation also requested Switzerland to extradite Adamov so that it could institute criminal proceedings against him.

[138] As M. Shaw notes, "the question of sovereign immunity is a procedural one and one to be taken as a preliminary issue". Op. cit., pp. 623 and 624. "English law treats the immunity as a procedural issue to be taken account of at the earliest stage of the proceedings, international law seems so to require." H. Fox, *The Law of State immunity* (New York: Oxford University Press, 2002), p. 13.

[139] *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, advisory opinion of 20 April 1999, *I.C.J. Reports 1999*, para. 67.

instruments concerning questions of immunity contain various provisions relating to immunity from jurisdiction and to immunity from measures of execution or interim measures of protection (for example: article 31, paragraphs 1 and 3, of the 1961 Convention on Diplomatic Relations; article 31, paragraphs 1 and 4, of the 1969 Convention on Special Missions; and article 30, paragraphs 1 and 2, of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character). However, there is no such provision in the 1963 Convention on Consular Relations (article 43 of the Convention refers simply to immunity from jurisdiction). At this stage at least, it seems advisable simply to address immunity of State officials from foreign criminal jurisdiction, without dealing with the question of immunity from interim measures of protection or measures of execution.

6. Immunity, the non-justiciability doctrine and the act of State doctrine

71. In addition to immunity, there are also other limitations on State jurisdiction. These are the non-justiciability and act of State doctrines. Both were developed in the Anglo-Saxon legal system and are mainly used in the courts of common law States. However, as B. Stern notes, similar approaches are also found in civil law countries.[140]

72. No precise definition exists of the two doctrines. As H. Fox notes, "non-justiciability is a doctrine of uncertain scope. It may be raised as a plea in proceedings whether or not a foreign State is itself made a party to them, and may arise as preliminary plea or in the course of determination of the substantive law".[141] C. Wickremasinghe writes that in essence the non-justiciability doctrine means that "the subject matter of the claim is in fact governed by international law (or, possibly foreign public law) and so falls outside the competence of national courts to determine".[142] Referring to the non-justiciability doctrine, a domestic court may decide that it cannot consider, for example, a question pertaining to the realm of inter-State relations.[143]

73. I. Sinclair has noted that a distinction must be drawn between the concept of immunity and the concept of non-justiciability.[144] "Immunity, expressed in the maxim *par in parem non habet imperium*, is a principle concerned with the status of sovereign equality enjoyed by all independent States. This principle will be satisfied if the State waives its immunity, since the consent to the exercise of jurisdiction by the local courts upholds the status of sovereign equality. Non-justiciability, or lack of jurisdiction in the local courts by reason of the subject-matter, is a concept which, although it may be related, is distinct. Thus, a court may refuse to pronounce upon the validity of a law of a foreign State applying to matters within its own territory, on the ground that to do so would amount to an assertion of jurisdiction over the internal affairs of that State."[145]

---

[140] Op. cit., p. 64.

[141] "International law ..." (see note 129 above), p. 377.

[142] "Immunities enjoyed by officials of States and International Organizations", in M. D. Evans, (ed.), *International Law*, Oxford University Press, 2006, 2nd ed., p. 390.

[143] "Non-justiciability bars a national court from adjudicating certain issues, particularly international relations between States, by reason of them lacking any judicial or manageable standards by which to determine them," H. Fox, op. cit., p. 359.

[144] Op. cit., p. 198.

[145] Ibid., pp. 198 and 199.

74. The act of State doctrine also essentially limits the exercise of jurisdiction over a foreign State. Its application is closely connected with the consideration by courts of questions of prejudice to the right to property located in the foreign State caused by acts performed by that State which affect this right.[146] In such proceedings, the validity of acts (normative or enforcing) performed by the foreign State may be disputed. H. Fox writes that "act of State is a defence to the substantive law requiring the forum court to exercise restraint in the adjudication of disputes relating to legislative or other governmental acts which a foreign State has performed within its territorial limits".[147] Usually the result of application of the non-judiciability doctrine is that the court recognizes the validity of the act of the foreign State. This approach is based on the principle of respect for State sovereignty, for the sovereign equality of States. Because what is involved is an act of another sovereign State, the national court refrains from considering the question of its validity and limits itself to formally acknowledging the act.

75. At least in this form, the act of State doctrine seems narrower than the non-justiciability doctrine. By applying the act of State doctrine in this way, the court (albeit to a limited extent) does consider the substance of the question whether the act of the foreign State is valid. When it applies the non-justiciability doctrine in a similar situation, the court does not consider the substance of the question at all.[148] However, the two doctrines can be viewed as being quite similar, especially if, applying the act of State doctrine, the court declines outright to rule on the validity of the act of the foreign State, as do United States courts, for example. For instance, in the 1962 ruling in *Banco Nacional de Cuba v. Sabbatino*, Judge Waterman noted: "The Act of State Doctrine, briefly stated, holds that American Courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories. ... This doctrine is one of the conflict of law rules applied by American Courts; it is not itself a rule of international law. ... The act of state doctrine stems from the concept of the immunity of the sovereign because 'the sovereign can do no wrong'."[149]

---

[146] "The Act of State doctrine has been applied in the United States primarily in the context of foreign expropriations in which a governmental act is alleged to have violated the applicable norms of international law." J.-P. Fonteyne, "Acts of State", in *Encyclopedia of Public International Law*, vol. I (Amsterdam: Elsevier, 1992), p. 17.

[147] Op. cit., p. 358.

[148] As Lord Wilberforce noted in the case *Buttes Gas & Oil Co. v. Hammer* [1982], "there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign States. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but one for judicial restraint or abstention". *International Law Reports*, vol. 64, p. 331, at p. 344.

[149] *Banco Nacional de Cuba v. Sabbatino*, U.S. Court of Appeals, 2nd Circuit, 6 July 1962, 307 F 2d 845, reproduced in *American Journal of International Law*, vol. 56 (1962), p. 1085, at pp. 1090 and 1091. As E. Denza notes, "the terms 'act of state' and 'non-justiciability' might more appropriately be replaced by a modern 'doctrine of a proper court' — parallel to the doctrine of *forum non conveniens* in private international law". "*Ex Parte Pinochet*: Lacuna or Leap?", *International and Comparative Law Quarterly*, vol. 48 (1999), p. 946, at pp. 957-995.

76. In the latter ruling, it is noteworthy that direct reference is made to the link between the act of State concept and the concept of immunity.[150] The similarity between the two concepts is particularly striking when one considers the question of immunity of State officials from foreign criminal jurisdiction in respect of acts performed by them in an official capacity. However, there are also significant differences between immunity and the act of State doctrine. "The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional. ... Rather it is a prudential doctrine designed to avoid judicial action in sensitive areas. Sovereign immunity is a principle of international law, recognized in the US by statute. It is the states themselves, as defendants, who may claim sovereign immunity. The act of state doctrine is a domestic legal principle, arising from a peculiar role of American courts. It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government."[151]

77. It is also noteworthy that the act of State and non-justiciability doctrines, unlike the immunity of State officials from foreign criminal jurisdiction, apply only in court and therefore may limit only the judicial and not the executive jurisdiction of the foreign State. They are not used as a defence from the criminal jurisdiction of a foreign State (from criminal procedure actions) in the pre-trial phase.[152]

---

[150] The similarity of the two concepts is noted, for example, in the ruling of the Court of Appeals in the case *International Association of Machinists and Aerospace Workers v. Organization of Petrolcum Exporting Countries (OPEC) et al.*: "The doctrine of sovereign immunity is similar to the act of state doctrine in that it also represents the need to respect the sovereignty of foreign states". U.S. Court of Appeals, Ninth Circuit, 6 July 1981 (amended 24 August 1981), 649 F 2nd 1354, 1359; reproduced in *International Law Reports*, vol. 66, p. 413, at p. 418.

[151] Ibid. In this sense, the act of State doctrine seems close to the non-justiciability doctrine and to the political question doctrine. The latter is mentioned in the ruling quoted above: "The act of state doctrine is similar to the political question doctrine in domestic law. It requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question." Ibid., p. 417.

[152] For details on the similarity and differences between immunity and the act of State and non-justiciability doctrines, see, for example, I. Brownlie, *Principles of International Law*, 6th ed., Oxford University Press, 2003, pp. 320 and 321; H. Fox, *The Law of State Immunity* (New York: Oxford University Press, 2002), pp . 477-502; P. J. Meagher, "Act of State and sovereign immunity: the *Marcos* cases", *Harvard International Law Journal*, vol. 29, No. 1 (Winter 1988), pp. 127-134; H. F. Van Panhuys, "In the borderland between the act of state doctrine and questions of jurisdictional immunities", *International Comparative Law Quarterly*, vol. 13 (1964), pp. 1193-1213; L. Y. Parseghian, "Defining the 'public act' requirement in the act of state doctrine", *University of Chicago Law Review*, vol. 58 (1991), pp. 1151-1180; B. Stern, op. cit, pp. 63-87; M. Zander, "The act of state doctrine", *American Journal of International Law*, vol. 53 (1959), pp. 826-852.

7. Immunity of officials *ratione personae* and immunity of officials *ratione materiae*

78. A distinction is usually drawn between two types of immunity of State officials: immunity *ratione personae* and immunity *ratione materiae*.[153] Immunity *ratione personae* or personal immunity is derived from the official's status and the post occupied by him in government service and from the State functions which the official is required to perform in that post. This type of immunity from foreign criminal jurisdiction is enjoyed by officials occupying senior or high-level government posts[154] and by diplomatic agents accredited to the host State (in accordance with customary international law and with article 31, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations).[155] It would seem that immunity *ratione personae* is the oldest form of immunity. It was enjoyed and is still enjoyed to this day by Heads of State. A Head of State was considered to be invested with sovereignty and was identified with and personified the State itself. This was the source of the absolute immunity of the Head of State, which also extended to the State. Over time, the immunity of the State and the immunity of the Head of State started to be considered separately, but the immunity *ratione personae* of the Head of State is still generally recognized today.

79. Immunity *ratione personae* extends to acts performed by a State official in both an official and a private capacity, both before and while occupying his post.

---

153 These two types of immunity are dealt with in detail, for example, in the Pinochet No. 3 case, *International Law Review*, vol. 38 (1999), p. 580, at pp. 600, 601, 605, 606, 644, 645, etc. The existence of these two types of immunity of officials was also recognized by France and Djibouti during the International Court of Justice oral pleadings in the case *Certain Questions of Mutual Legal Assistance in Criminal Matters (Djibouti v. France)*: International Court of Justice, document CR 2008/3, p. 15, para. 23 and CR 2008/5, pp. 50 and 51, paras. 75-77. These two types of immunity are mentioned in the commentaries of the International Law Commission to article 1, paragraph (b) (v), of the draft articles on jurisdictional immunities of States and their property: *Yearbook ... 1991*, vol. II (Part Two), pp. 18 and 19. See also, for example, A. Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), pp. 265-273; A. Day, "Crimes against humanity as a nexus of individual and State responsibility: why the ICJ got Belgium v. Congo wrong", *Berkeley Journal of International Law*, vol. 22 (2004), p. 489, at p. 493; M. Frulli, "The question of Charles Taylor's immunity: still in search of balanced application of personal immunities?", *Journal of International Criminal Justice*, 2 (2004), pp. 1125 and 1126; S. Wirth, "Immunity for core crimes? The ICJ's Judgment in the Congo v. Belgium case", *European Journal of International Law*, vol. 13, No. 4 (2002), p. 877, at pp. 882 and 883; M. A. Summers, "Immunity or impunity? The potential effect of prosecutions of State officials for core international crimes in States like the United States that are not parties to the Statute of the International Criminal Court", *Brooklyn Journal of International Law*, vol. 31:2 (2006), p. 463, at p. 464; P. J. Toner, "Competing concepts of immunity: revolution of the head of State immunity defense", *Penn State Law Review*, vol. 108 (2003-2004), p. 899, at p. 902; A. Borghi, op. cit., pp. 53-56; C. J. Barker, "The future of former Head of State immunity after *ex parte Pinochet*", *International and Comparative Law Quarterly*, vol. 48 (1999), p. 937, at pp. 939-944; Y. Simbeye, op. cit., pp. 109-111, 123; A. G. Hamida, K. M. Sein, H. A. Kadouf, "Immunity versus international crimes: the impact of *Pinochet* and *Arrest Warrant* cases", *Indian Journal of International Law*, vol. 46, No. 4 (October-December 2006), p. 495, at pp. 510 and 511.

154 The question whether it is possible (and, if it is possible, how) to single out those high-ranking officials who, unlike other high-ranking officials, enjoy personal immunity will be considered in the section concerning the group of officials covered by this topic.

155 Other State officials — for example, representatives of the sending State in a special mission (in accordance with article 31, paragraph 1, of the 1969 Convention on Special Missions) — may also enjoy such immunity under international treaties.

Since it is connected with the post occupied by the official in government service, it is temporary in character, becomes effective when the official takes up his post and ceases when he leaves his post.

80. State officials enjoy immunity *ratione materiae* regardless of the level of their post, by virtue of the fact that they are performing official State functions. Immunity *ratione materiae* is sometimes also called functional immunity. This type of immunity extends only to acts performed by State officials acting in an official capacity, i.e. performed in fulfilment of functions of the State. Accordingly, it does not extend to acts performed in a private capacity. When the official leaves government service, he continues to enjoy immunity *ratione materiae* with regard to acts performed while he was serving in an official capacity.[156]

81. If this categorization of immunity is used, it follows that certain State officials (exactly which ones is not clear) enjoy both immunity *ratione personae* and immunity *ratione materiae* from foreign jurisdiction and that all State officials enjoy immunity *ratione materiae*.[157]

82. The distinction between these two types of immunity of State officials is minor, in the case of serving officials occupying high-level posts in government service. The immunity *ratione personae* of a Head of State, Head of Government, minister for foreign affairs and some other high-ranking officials essentially encompasses immunity *ratione materiae*. For this reason, in order to distinguish more precisely the two types of immunity in the case of high-ranking officials, it is sometimes said that immunity *ratione personae* extends only to acts performed by them in a private capacity (acts of high-ranking officials in an official capacity are covered by immunity *ratione materiae*, regardless of whether the official is occupying the post or has already left it).[158]

---

[156] Of course, the question is which acts should be considered as having been performed "in an official capacity". The answer to this question is of paramount importance for determining the extent and limits of immunity. The question will be considered in the section concerning the extent of immunity.

[157] Sometimes immunity *ratione personae* is called procedural immunity and immunity *ratione materiae* is called substantive immunity. For example, A. Cassese considers that immunity *ratione materiae* "relates to substantive law, that is, it is a substantive defence" and immunity *ratione personae* "relates to procedural law, that is, it renders the State official immune from civil or criminal jurisdiction (it is a procedural defence)". Op. cit., p. 266. However, he admits that "if the State official acting abroad has breached criminal rules of the foreign State, he may incur criminal liability and be liable under foreign criminal jurisdiction". Ibid., note 6. D. S. Koller holds a similar opinion; cf. "Immunity of foreign ministers: paragraph 61 of the Yerodia judgment as it pertains to the Security Council and International Criminal Court", *American University International Law Review*, vol. 20 (2004), p. 7, at pp. 25 and 26. See also, for example, A. Day, op. cit., p. 490; M. Frulli, op. cit., pp. 1125 and 1126. The same views were advanced by the plaintiff in the case *Wei Ye, Hao Wang, Does A, B, C, D, E, F, and others similarly situated v. Jiang Zemin and Falun Gong Control Office, a/k/a Office 610*, Supreme Court of the United States, Petition for a writ of certiorari, p. 7. However, it seems that, for the reasons stated above, immunity in any case is procedural in nature. An additional argument is provided by the opinion of the Appeals Chamber of the Special Court for Sierra Leone: "The question of sovereign immunity is a procedural question", *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, para. 27.

[158] See, for example, the commentaries to the Commission's draft articles on jurisdictional immunities of States and their property: "Apart from immunities *ratione materiae* by reason of the activities or the official functions of representatives, personal sovereigns and ambassadors are entitled, to some extent in their own right, to immunities *ratione personae* in respect of their persons or activities that are personal to them and unconnected with official functions." *Yearbook ... 1991*, vol. II (Part Two), p. 18.

83. The separation of immunity of officials into immunity *ratione personae* and immunity *ratione materiae* and the use of these terms are appropriate for analytical purposes for the study of this question and for the process of demonstrating the immunity of State officials.[159] The question arises, however, how necessary this is for the legal regulation of the subject of immunity of State officials from foreign criminal jurisdiction. In the wording of its judgment in the *Arrest Warrant* case, the International Court did not use this categorization of immunity or, as a result, the terms "immunity *ratione personae*" and "immunity *ratione materiae*". The Court decided whether the Minister for Foreign Affairs enjoyed immunity from foreign criminal jurisdiction on the basis of whether the acts were performed by him while in office or after he had already left office and whether the acts had been performed by him in an official capacity or in a private capacity.[160] This categorization was also not used in the conventions on diplomatic and consular relations, on special missions and on the representation of States in their relations with international organizations of a universal character. The concepts of immunity *ratione personae* and immunity *ratione materiae* were not used in the Resolution of the Institute.[161]

8. Rationale for the immunity of State officials from foreign criminal jurisdiction

84. The rationale for the immunity of State officials may determine which officials enjoy immunity and the extent of their immunity. The preambles to the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Vienna Convention on Special Missions contain provisions explaining why immunity is granted to the individuals concerned.[162]

85. The preamble to the 1961 Vienna Convention states, inter alia: "... the purpose of ... privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". Similar provisions are contained in the preambles to the 1963 Vienna

---

[159] For the purpose of substantiating the existence or absence of immunity, this categorization was used, for example, in the cases Pinochet No. 1 and No. 3 (see note 74 above) and Jones No. 1 (note 114) and No. 2 (note 80).

[160] See, inter alia, paragraphs 54, 55 and 61 of the judgment.

[161] In the 2004 Convention on Jurisdictional Immunities of States and their Property, this categorization of immunity is used, partly explicitly and partly implicitly: article 3, paragraph 2, states that the Convention is without prejudice to the immunities of a Head of State *ratione personae*. Immunity *ratione materiae* is not mentioned directly but it appears from article 1 (on the application of the Convention to the immunity of a State) and from article 2, paragraph 1 (b) (iv) (from which it follows that "State" includes representatives of the State acting in that capacity), that it is indeed governed by the Convention.

[162] A provision explaining why special treatment must be given to Heads of State and Heads of Government and why they must be granted immunity from foreign jurisdiction is also contained in the preamble to the resolution of the Institute of International Law: "... special treatment is to be given to a Head of State or Head of Government, as a representative of that State and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfillment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole." *Yearbook of the Institute of International Law*, vol. 69 (2000-2001), p. 743.

Convention and the Convention on Special Missions.[163] In the judgment of the International Court of Justice in the *Arrest Warrant* case, the granting of immunities to the Minister for Foreign Affairs is explained in almost the same terms: "In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States."[164]

86. Regarding this provision in the Court judgment, commentators usually emphasize that the Court justified the immunity of the Minister for Foreign Affairs by reference to functional necessity.[165] However, no attention is paid to the part of the Court's justification where it states that immunities are granted to ministers for foreign affairs in order to ensure the effective performance of functions "on behalf of their respective States". As noted above, the rationale for the immunity of ministers for foreign affairs given by the Court is similar to the rationale for the immunities in the above-mentioned Conventions. However, in these convention rationales for immunity, the words "as representing States", "on behalf of their respective States" and "representing the State" are included deliberately in order to emphasize that immunity is granted not only in order to ensure the performance of the actual functions of diplomatic and consular agents and members of special missions, but because the functions are performed by diplomatic missions, consular services and special missions, as the case may be, as representatives of the State, acting on its behalf.[166] It appears that this is also how the words "on behalf of their respective States" in the above-mentioned passage from the judgment of the International Court of Justice should be taken into account and interpreted.

87. These convention formulations of the rationale for immunities reflect the two basic theories explaining the reasons for granting to State officials immunity from foreign jurisdiction: the "functional necessity" theory and the "representative

---

[163] The fifth preambular paragraph of the 1963 Vienna Convention states that "the purpose of ... privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States". The seventh preambular paragraph of the 1969 Convention on Special Missions states: "... the purpose of privileges and immunities relating to special missions is not to benefit individuals but to ensure the efficient performance of the functions of special missions as missions representing the State."

[164] *I.C.J. Reports 2002*, p. 22, para. 53.

[165] According to A. Cassese, the Court "... logically inferred from the rationale behind the rules on personal immunities of senior state officials, such as heads of state or government or diplomatic agents, that such immunities must perforce prevent any prejudice to the 'effective performance' of their functions". "When may senior State officials be tried for international crimes? Some comments on *Congo v. Belgium* Case", *European Journal of International Law*, vol. 13 (2002), No. 4, p. 855, at p. 855. As D. Koller notes, "[t]he Court contended these functions make it necessary that the foreign minister receive absolute immunity from the jurisdiction of foreign state courts, even when visiting such states on private visits". Op. cit., p. 11. M. Sassoli writes: "[l]a Cour précise ... les fonctions d'un ministre des affaires étrangères dans les relations internationales, pour ensuite en conclure que, pour toute la durée de sa charge, il bénéficie d'une immunité de juridiction pénale et d'une inviolabilité totales à l'étranger". "Les immunités internationales", in *L'arret Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international, Revue générale de droit international public*, vol. 4 (2002), p. 791, at p. 797.

[166] See, for example, E. Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, 2nd ed., Oxford, 1998, pp. 11 and 12.

character" theory.[167] As noted in the Commission's commentaries to the draft articles on diplomatic relations, the "representative" theory gave as the rationale for diplomatic immunity the idea that the diplomatic mission personifies the sending State and the "functional" theory gave as the rationale the fact that immunity is necessary to enable the diplomatic mission to perform its functions. In addition, the Commission noted that it was guided by the "functional necessity" theory "in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself".[168] Thus traces of both these theoretical approaches can be found in the rationale for immunity granted in accordance with the rules of international law codified in the above-mentioned Conventions. Neither approach has been used exclusively. In the light of the foregoing, this is also true of the judgment in the *Arrest Warrant* case.[169]

88. As the Commission noted in the commentaries to article 2, paragraph 1 (b) (v), of the draft articles on jurisdictional immunities of States and their property, immunity *ratione materiae* is granted "by reason of the activities or the official functions of [State] representatives".[170] Officials of a State acting in an official capacity are performing acts of the State. In other words, the State is acting through its representatives, when they are acting in this capacity. In this connection, the Commission noted: "Actions against ... representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State ..."[171] Just as acts performed in an official capacity by officials of the State are in fact acts of the State itself, so the immunity which they enjoy in respect of such acts is in fact immunity of the State. Immunity in respect of acts performed in an official capacity remains in effect after the official has left the service of the State because it is in fact immunity of the State. Indeed, "State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities,

---

[167] A third basic theory on this subject — the theory of exterritoriality, according to which the premises of the sovereign, ambassador or diplomatic mission in the host State represents a sort of extension of the territory of the sending State to the place where they are located in the host State — has long ceased to exist and be used. For more details regarding the theory, see L. Strisower, "L'exterritorialité et ses principales applications", *Recueil des Cours*, vol. I (1923), pp. 233 et seq.

[168] *Yearbook ... 1958*, vol. II, p. 95. For further details regarding theories explaining the immunity of officials, see A. Borghi, op. cit., pp. 42-57 and S. Sucharitkul, op. cit., pp. 115-121.

[169] If, when the functional theory is applied, it is argued that immunity is necessary for the official to perform not simply functions, but specifically functions in order to represent the State or functions on behalf of the State, no difference between the two theories is discernible.

[170] *Yearbook ... 1991*, vol. II (Part Two), p. 18.

[171] Ibid.

being immunity *ratione materiae*."[172] It seems that this is true of immunity both from civil and from criminal jurisdiction.[173]

89. Does the attribution to the State of illegal and criminally punishable conduct by a State official (i.e. an individual) mean that this conduct cannot also be attributed to the individual himself? It would seem not. The conduct of a State official, acting in an official capacity, is not exclusively attributed to the State itself.[174] If the illegal conduct of an official in an official capacity were attributed only to the State which the official is serving, the question of the criminal liability of the official could never arise. However, this is not the case. If the State waives the immunity enjoyed by the official, that official will incur criminal liability for those acts which are his (of course, waiver of immunity is not in itself sufficient to create liability, but it makes it possible for foreign criminal jurisdiction to be exercised over the official to the full extent, including criminalization). The immunity *ratione materiae* enjoyed by an official is derived from the fact that his conduct is official and is attributed to the State on behalf of which he is acting but it

---

[172] Ibid.

[173] Among recent examples of this rationale for immunity of State officials from foreign criminal jurisdiction, mention may be made of the discussion between the Counsel for Djibouti, L. Condorelli, and the Counsel for France, A. Pellet, during oral pleadings in the International Court of Justice on the case *Certain Questions of Mutual Legal Assistance in Criminal Matters (Djibouti v. France)*. L. Condorelli thus described the immunity of the State Prosecutor and Head of National Security of Djibouti: "What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as that organ [para. 24]. The Respondent cannot overlook the fact that if one consults the writings of reputed experts who have analysed the subject, one is struck by the conclusion that the vast majority of them have the same point of view. From Kelsen and Fox to Morelli and Quadri, Dahm, Bothe, Akehurst, Cassese and still many more [footnotes omitted], all are convinced of the existence of a principle of international law stipulating that organs of a State benefit from immunity from the jurisdiction of foreign States for acts carried out in the performance of that function." Document CR 2008/3 (translation), 22 January 2008 at 3 p.m., pp. 9 and 10, paras. 23 and 24. A. Pellet did not object to the principle stated by L. Condorelli. He noted, "when they act in an official capacity, the organs of the State do not engage their own responsibility, but that of the State; consequently their acts enjoy the immunities of the State." Document CR 2008/5 (translation), 25 January at 10 a.m., p. 42, paras. 74 and 75. The Counsel for France did not agree with his opponent on how to put this principle into practice. Ibid., p. 43, paras. 76 and 77.

[174] In the *Blaskic* case, the International Tribunal for the Former Yugoslavia stated that "officials are mere instruments of a State and their official act can only be attributed to the State". *Prosecutor v. Blaskic*, Appeals Chamber, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 38. This assertion seems to be contradicted by the theory advanced in the text. However, later in the judgment, the Court affirms that "each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that individual organ may not be held accountable for those acts or transactions". Ibid., para. 41. Thus in fact the Court seems to be saying that the State is entitled to request that acts performed by its official in an official capacity should be considered as acts of the State itself but does not preclude the possibility of such acts being attributed not only to the State but also to the official, unless the State concerned insists that they should not.

does not preclude this conduct also being attributed to the official himself.[175] Immunity does not change anything as regards the substantive conditions which must exist in order for the individual enjoying immunity to incur criminal liability. This, incidentally, seems to provide further evidence that immunity *ratione materiae* is procedural and not substantive in nature.

90. Immunity *ratione personae* also has a mixed functional/representative rationale.[176] As has been noted, immunity *ratione personae* is enjoyed only by persons occupying senior or high-level posts in the government and is directly related to those posts. Authors describing the functional rationale for immunity *ratione personae* usually state that this immunity is granted to persons who occupy not only senior or high-level posts but also posts that are directly connected with the performance of functions of representation of the State in international relations.[177] Here, however, a question arises: can the sole rationale for personal immunity be the need to perform functions of representation of the State in international relations? Supposing the Defence Minister is the official concerned? He usually has functions of representation of the State in international relations. However, he mainly performs functions inside the country. Yet they are directly concerned with ensuring the sovereignty and security of his State. In this connection, is not another logical rationale for immunity *ratione personae* the fact that the official concerned occupies a senior or high-level government post, in which he performs functions that are extremely important for ensuring the sovereignty of the State?

91. Despite the popularity of the functional necessity theory, the immunity of the Head of State, for example, is frequently justified by reference to the fact that the Head of State personifies the State itself, i.e., the representation theory. This rationale for the immunity of the Head of State became particularly clear during the

---

[175] As J. Verhoeven notes, "[q]u'un acte soit imputable à l'Etat au sens du droit international n'implique pas de soi que la personne à l'intermédiaire de laquelle cet acte a été nécessairement accompli ne puisse pas être tenue d'en rendre compte devant une autorité étrangère et sur la base de droit national. C'est précisement la raison pour laquelle certains 'organes' bénéficient d'immunités". "Les immunités propres aux organes ou autres agents des sujets du droit international", in Verhoeven, J. (dir.), *Le droit international des immunités: contestation ou consolidation?* (Brussels: Librairie générale de droit et de jurisprudence (2004), p. 68. Although this is not the subject covered by the topic, it is also noteworthy that waiver of immunity enjoyed by an official does not alter the situation as regards attribution of acts performed by that official to the State waiving immunity. These continue to be attributed not only to the individual who performed them but also to the State. Thus, in the event of waiver of immunity by a State, the liability of the official, the individual, still exists, as does the basis for raising the issue of the liability for these acts of the State itself.

[176] As the Court noted in the *Tachiona v. Mugabe* case, "... any form of legal compulsion asserted directly against a foreign state leader or diplomat not only serve to create hindrances to the performance of the foreign official's functions, but constitute affronts to both the person and dignity of the ruler and to the sending foreign state". U.S. District Court, Southern District of New York, 30 October 2001. Compare also: "Customary public international law grants such privileges *ratione personae* to Heads of State as much to take account of their functions and symbolic embodiment of sovereignty as by reason of their representative character in inter-State relations." *Marcos and Marcos v. Federal Department of Police*, Swiss Federal Tribunal, 2 November 1989, reproduced in *International Law Reports*, vol. 102, p. 198, at p. 201.

[177] "... les fonctions qui doivent être prises en considération sont celles qui sont internationales par nature, c'est-à-dire qui impliquent nécessairement une relation avec un ou plusieurs autres Etats (sujets de droit international)." J. Verhoeven, op. cit., p. 89.

consideration of the *Pinochet* case.[178] However, court rulings also provide examples of a "more functional" rationale for the immunity of the Head of State. United States court rulings, for example, have drawn attention to the fact that Heads of State need immunity in order to be able to freely perform their State duties (see *In re Grand Jury Proceedings* and *Lafontant v. Aristide*).[179]

92. The primarily functional rationale for the immunity of ministers for foreign affairs, cited by the International Court in the *Arrest Warrant* case, is also extrapolated to other individuals who enjoy immunities *ratione personae*.[180] The Court itself provided the grounds for this in paragraph 51 of its judgment by placing ministers for foreign affairs on the same level as some other high-ranking State

---

[178] See Pinochet No. 3, *International Legal Materials*, vol. 38 (1999), p. 580. Lord Millet: "[t]he immunity of the serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and the sovereignty of the state which he personifies and a denial of the equality of the sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs" (at p. 644); Lord Brown-Wilkinson: "It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. ... This immunity enjoyed by a head of state in power [...] is a complete immunity attaching to the person of the head of state ... and rendering him immune from all actions and prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*" (at p. 592); Lord Goff of Chieveley: "The principle of state immunity is expressed in the Latin maxim *par in parem non habet imperium*, the effect of which is that one sovereign does not adjudicate on the conduct of another. This principle applies as between states, and the head of a state is entitled to the same immunity as the state itself ..." (at p. 598).

[179] "Like the related doctrine of sovereign immunity, the rationale of head-of-state immunity is to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system." *In re Grand Jury Proceedings*, Doe No. 700, United States Court of Appeals, Fourth Circuit, 5 May 1987, reproduced in *International Legal Reports*, vol. 81, p. 599 at p. 601. (See also *United States v. Noriega and Others*, United States District Court, Southern District of Florida, 8 June 1990, reproduced in *International Legal Reports*, vol. 99, p. 143 at p. 161). In the *Lafontant v. Aristide* case, the District Court stated: "Heads of state must be able to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system." United States District Court, Eastern District of New York, 27 January 1994, reproduced in *International Legal Reports*, vol. 103, p. 581 at p. 585.

[180] According to D. Akande: "Since heads of states, diplomats, and other officials accorded immunity *ratione personae* will be hindered in the exercise of their functions if they are arrested and detained while in a foreign state, these officials are absolutely immune from the criminal jurisdiction of the foreign state." "International law immunities and the International Criminal Court", *American Journal of International Law*, vol. 98 (2004), p. 407, at pp. 409 and 410. S. Wirth notes that "... according to the Court, the rationale of the immunity available for Heads of State and Ministers of Foreign Affairs is their ability to discharge their functions." Op. cit., para. 879. As S. De Smet notes: "The rationale for the concept of personal immunity is based on the need to guarantee the unhindered exercise of official functions." "The immunity of Heads of States in US Courts after the Decision of the International Court of Justice", *Nordic Journal of International Law*, vol. 72 (2003), p. 313 at p. 319.

officials, such as the Head of State and the Head of Government.[181] The immunity enjoyed by high-ranking officials, such as Heads of State, Heads of Government and ministers for foreign affairs, protects them from foreign jurisdiction, not only in connection with their official actions, but also in connection with actions performed by them in a personal capacity. The latter may not be directly attributed to the State. It is sometimes said that immunity *ratione personae*, i.e., personal immunity, is enjoyed by the relevant officials "to some extent in their own right".[182] If that assertion is true, then it only appears to be so because of the words "to some extent". It is no coincidence that almost immediately following this phrase the Commission, in its commentary to article 2, paragraph 1 (*b*) (*v*), of the draft articles on jurisdictional immunities of States and their property, noted: "Indeed, even such immunities inure not to the personal benefit of sovereigns and ambassadors but to the benefit of the States they represent, to enable them to fulfil their representative functions or for the effective performance of their official duties."[183]

93. Even when there is a functional rationale for the immunity *ratione personae* of the relevant officials, as expressed by the International Court of Justice and the International Law Commission, the connection between such immunity and the State served by such officials appears to be obvious. The immunity that they enjoy, even in respect of acts performed in a personal capacity (including acts performed prior to taking office), protects them only because it is necessary in order to ensure that their activities in senior or high-level government positions are free from foreign interference, i.e. only because it is necessary in the interest of the State they are serving. This immunity is granted only because the duties performed by the individual in the State are so important for the sovereign and independent functioning of the State. In this sense, immunity *ratione personae* can only conditionally be called "personal".

94. The State stands behind both the immunity *ratione personae* of its officials from foreign jurisdiction and their immunity *ratione materiae*.[184] It is the State that is entitled to waive the immunity enjoyed by an official, whether it is *ratione personae* or *ratione materiae* (in the case of a serving high-ranking official) or only

---

[181] One can only conjecture what the rationale for immunity would have been had this case concerned the Head of State rather than the Minister for Foreign Affairs. In this connection, it is worth noting the rationale for the immunity of the Head of State cited by Rosalyn Higgins, President of the International Court of Justice: "The situation regarding sitting Heads of State is clear under general international law. The Head of State is seen as personifying the sovereign State and the immunity to which he was entitled is predicated on status." "After Pinochet: developments on Head of State and ministerial immunities", *The Incorporated Council of Law Reporting Annual Lecture 2006*, p. 12, available at: www.lawreports.co.uk.

[182] *Yearbook ... 1991*, vol. II (Part Two), p. 18.

[183] Ibid., pp. 18 and 19. It should be noted that this wording is very similar to the wording cited in paragraph 85 above, contained in paragraph 53 of the judgment of the International Court of Justice in the *Arrest Warrant* case.

[184] In the words of Lord Saville of Newdigate concerning the Pinochet case: "These immunities [immunities *ratione personae* and *ratione materiae*] belong not to the individual but to the state in question". Pinochet No. 3, *International Legal Materials*, vol. 38 (1999), p. 580 at p. 642.

ratione materiae (in the case of any official who has left government service).[185] In the final analysis, the immunity of State officials from foreign jurisdiction belongs to the State itself, so that it alone is entitled to waive such immunity.

95. The functional, representative or functional/representative rationale for the immunity of State officials is, so to speak, a direct rationale. One State, in exercising its criminal jurisdiction over officials of another State, may not hamper the performance by those officials of their government functions, interfere with activities related to the performance of those functions, or create obstacles to the activities of persons representing the other State in its international relations, because in essence they are activities of another sovereign State. As was also the case many years ago, the underlying principles of inter-State relations are the reason behind the functional, representative or mixed rationale. Alongside international comity, the principles of full equality and absolute interdependence of sovereigns and sovereign States,[186] referred to in connection with the exercise of national jurisdiction in the maxim *par in parem non habet imperium*, were already cited in the judgments in the *Schooner Exchange v. McFaddon* (1812) and *Parlement Belge* (1880) cases as the rationale for immunity, including the immunity of the State, the Head of State and the diplomatic representatives of the State. In contemporary international law these principles, transformed into the principles of sovereign equality of States and non-interference in internal affairs, continue to serve as the legal basis for the immunity of State officials from foreign criminal jurisdiction.[187]

---

[185] As noted in the judgment of the International Court of Justice in the *Arrest Warrant* case, State officials "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity". *Arrest Warrant* case (Judgment), para. 61. Regarding the fact that only the State served by the official is entitled to waive the immunity enjoyed by that official, see, for example, I. Brownlie, op. cit., p. 335; and S. Wirth, op. cit., p. 882. The fact that the State is entitled to waive the immunity of diplomatic agents, consular officials and members of special missions was established, respectively, in the 1961 Vienna Convention on Diplomatic Relations (article 32), the 1963 Vienna Convention on Consular Relations (article 45) and the 1969 Convention on Special Missions (article 41).

[186] In the *Parlement Belge* case, Lord Justice Brett said: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other foreign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign". Court of Appeal (United Kingdom), 27 February 1880, *The Law Reports. Probate Division*, vol. 5, p. 203 at p. 214. In *The Schooner Exchange v. McFaddon*, C. J. Marshall said: "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." Supreme Court of the United States, 1812, 7 Cranch, 116, at p. 136.

[187] "The substantive foundations of State immunity in international law as evidenced in the usages and practice of States may be expressed in terms of the sovereignty, independence, equality and dignity of States. All these notions seem to coalesce and together they constitute a firm international legal basis for sovereign immunity. As the term suggests, either 'State' or 'sovereign' immunity is derived from the principle of sovereignty ... It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, *par in parem non habet imperium*." S. Sucharitkul, op. cit., p. 117.

The principles of sovereign equality of States and *par in parem non habet imperium* were referred to as the rationale for the immunity of the Head of State in the *Pinochet* case.[188] The International Tribunal for the Former Yugoslavia referred to these very principles in the *Blaškić* case when considering whether it could address subpoenas to State officials: "The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*)."[189] In the judgment in the *Adamov* case, in the context of the issue of the immunity of a former member of the Government of the Russian Federation — the former Minister for Atomic Energy — the Federal Tribunal of Switzerland ruled that, under international law, immunity was designed to prevent one State from narrowing the immunity of another State and from exercising jurisdiction in respect of its sovereign acts and bodies.[190] These principles, which have been confirmed as the basis for immunity in numerous other court rulings[191] and cited as the rationale for the immunity of officials by States themselves,

[188] See, for example, note 178 above.

[189] *Prosecutor v. Blaškić*, Appeals Chamber, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 41.

[190] Federal Tribunal, *Evgeny Adamov v. Federal Office of Justice*, Judgment of 22 December 2005, ATF 132 II 81, para. 3.4.2.

[191] For example, in the ruling in the *Charles Taylor* case, the Appeals Chamber of the Special Court for Sierra Leone ruled that the principle of State immunity derives from the equality of sovereign States and therefore one State may not adjudicate on the conduct of another State. Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, 31 May 2004, para 51. The European Court of Human Rights has repeatedly stated that "sovereign immunity of States is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State". Decision of 12 December 2002 on the inadmissibility of *Kalogeropoulou and Others v. Greece and Germany*, p. 8. See also the three rulings adopted by the European Court on 21 November 2001 with respect to *Al-Adsani v. the United Kingdom* (Application No. 35763/97, para. 54), *McElhinney v. Ireland* (ECHR, Application No. 31253/96, para. 35) and *Fogarty v. the United Kingdom* (Application No. 37112/97, para. 34). According to United States judicial practice: "Head-of-state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations." *In re Grand Jury Proceedings*, John Doe No. 700, 817 F.2d 1108, 1110, Judgment of 5 May 1987, reproduced in *International Legal Reports*, vol. 81, p. 599 at pp. 601 and 602.

including in their submissions to the courts,[192] are widely supported in doctrine.[193]

96. The international law rationale given for the immunity of State officials from foreign criminal jurisdiction is, in turn, based on political considerations that are fundamental for States and the international community. Recognition of the immunity required for the normal functioning of States and their representation in international relations, based on the principles of sovereign equality of States and non-interference in internal affairs, is predicated on the need to ensure stability and predictability in inter-State relations.[194] The need to ensure stability in relations between States is frequently cited, alongside these principles of international law as the rationale for immunity, in court rulings, positions of States and doctrine. The need to support normal inter-State relations as the rationale for immunity was already referred to by the courts in the aforementioned rulings in the *Schooner Exchange v. McFaddon* and *Parlement Belge* cases.[195] As was noted in the *Adamov* case, the main purpose of immunity for sitting members of Government from criminal jurisdiction and from enforcement and executive proceedings is to maintain

---

[192] The Democratic Republic of the Congo, in its Memorial to the International Court in the *Arrest Warrant* case, complained of harm done to its sovereignty in the person of a member of its Government and expressed its intention to uphold a principle essential to the existence of well-ordered relations between civilized States, namely respect for the immunity of the persons responsible for conducting those relations (para. 16). According to the Memorial of Djibouti to the International Court in *Certain Questions of Mutual Legal Assistance in Criminal Matters* (*Djibouti v. France*), the actions of France towards President Ismaël Omar Guelleh could be perceived as an attack on the integrity and honour of the Head of State of Djibouti and on the sovereignty of Djibouti (para. 41).

[193] As noted by Charles Rousseau, "[l]a justification de l'exception de la jurisdiction étrangère est habituellement présentée en fonction du principe de l'indépendance de l'Etat ... Mais on peut aussi y voir une conséquence du principe de l'égalité des Etats ...: du moment que toutes les compétences d'Etat sont juridiquement égales, aucune d'elles ne peut entreprendre sur les autres, au moins que son action ne repose sur un titre conventionnel dérogatoire au droit commun." *Droit international public*, vol. IV, Paris, 1980, pp. 9 and 10. According to Antonio Cassese, personal immunity "is predicated on the notion that any activity of a head of state or government, or diplomatic agent or foreign minister, must be immune from foreign jurisdiction to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of foreign state agent[s] under the pretext of dealing with an exclusively private act". Op. cit., para. 862. P. J. Toner notes that "[t]he importance of safeguarding states from foreign interference is the policy foundation of immunities *ratione personae* and *ratione materiae*". "Competing concepts of immunity: the revolution of the head of state immunity defense", *Penn State Law Review*, vol. 108 (2004) para. 902. See also I. Bantekas, "In its more general form, immunity safeguards the political independence of the state concerned." "Head of State immunity in the light of multiple legal regimes and non-self-contained system theories: theoretical analysis of ICC third party jurisdiction against the background of the 2003 Iraq war", *Journal of Conflict & Security Law*, vol. 10 (Spring 2005), p. 21 at p. 32.

[194] As Charles Pierson notes: "Head of state immunity logically derives from state immunity that, in turn, derives from the equal and independent status of the nation state. Immunity is a concomitant of state sovereignty. Sovereignty's essence is that there be no authority higher than the state (*par in parem non habet imperium*). For one state to be compelled to submit to the jurisdiction of another is offensive to the 'dignity' of that state. Apart from these theoretical considerations, the practical justification for state immunity is that immunity promotes respect among states and helps preserve the smooth functioning of international relations. Reciprocity is key. The forum state grants immunity to other states so that they in turn will respect the immunity of the forum state." [Footnotes omitted.] "Pinochet and the end of immunity: England's House of Lords holds that a former Head of State is not immune for torture", *Temple International & Comparative Law Journal*, vol. 14 (Fall 2000), at pp. 269-270.

[195] See paragraph 95 above.

political stability. Immunity from criminal prosecution is designed to prevent the formal business of officials from becoming paralysed as a result of politically motivated charges being brought against them.[196] Furthermore, in the 2001 ruling in the *Tachiona v. Mugabe* case, the United States District Court noted: "The potential for harm to diplomatic relations between the affected sovereign states is especially strong in cases … that essentially entail branding a foreign ruler with the ignominy of answering personal accusations of heinous crimes."[197] The foreign policy rationale for the need to ensure immunity is generally found in submissions of the United States Department of State to United States courts, for example, when considering cases concerning immunity of foreign officials.[198]

97. Accordingly, the rationales given for the immunity of State officials from foreign criminal jurisdiction may be said to be complementary and interrelated. At least, in many cases this is how they are applied by the courts, used by the executive branches of States and cited in doctrine.

9. Immunity of State officials; diplomatic and consular immunities

98. Diplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations are State officials. They also possess special status and perform special functions — representation of the State in relations with other States and with international organizations. This special status and the role of these officials in organizing relations between States became the basis for the formulation of the special rules governing immunity of this category of officials from the jurisdiction of the host State. The immunities of these officials are generally called diplomatic and consular immunities, although — strictly speaking — the immunity of each of the above-mentioned four categories of officials is governed by rules contained in various sources. The immunity of diplomatic agents is governed by the rules of customary international law and the provisions of the 1961 Vienna Convention on Diplomatic Relations; the immunity of consular officials is governed by the rules of customary international law, the provisions of the 1963 Vienna Convention on Consular Relations and the provisions of bilateral consular conventions; the immunity of members of special missions is

---

[196] Federal Tribunal, *Evgeny Adamov v. Federal Office of Justice*, Judgment of 22 December 2005, ATF 132 II 81, para. 3.4.2.

[197] United States District Court for the Southern District of New York, *Tachiona v. Mugabe*, 30 October 2001, No. 00 CIV. 6666 (VM), p. 20.

[198] The decision of the United States District Court in the case concerning the former Director of the Israeli General Security Service, Avraham Dichter, contains a reference to the Statement of Interest of the United States Government: "[P]arting with this international consensus would threaten serious harm to U.S. interests, by inviting reciprocation in foreign jurisdictions. Given the global leadership responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad — including damages suits arising from alleged war crimes. The immunity defense is a vital means of deflecting these suits and averting the nuisance and diplomatic tensions that would ensue were they to proceed. It is therefore of critical importance that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn." United States District Court for the Southern District of New York, *Ra'ed Mohamad Ibrahim Matar, et al., Plaintiffs, v. Avraham Dichter, former Director of Israel's General Security Service, Defendant*, 2 May 2007, 500 F.Supp. 2d 284. The text of the Statement of Interest of the United States Government is available on the website of the United States Department of State; the text of the ruling is available at www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/07-01987.PDF, p. 10.

governed by the provisions of the 1969 Convention on Special Missions.[199] Lastly, immunity of representatives of States to international organizations is governed by the provisions of the conventions on the privileges and immunities of the relevant organizations or their headquarters agreements. The immunities of various categories of State officials that are embodied in international treaties undoubtedly carry much more weight than the immunity of other State officials.

99. Obviously, State officials who are diplomatic agents, consular officials, members of special missions or representatives of States to international organizations can be said to enjoy both the immunities common to all officials and the special immunities granted by international law to these special categories of officials. Usually, these officials enjoy the corresponding special immunities. However, there may be situations in which these officials enjoy not special immunities but the usual immunities of a State official from foreign criminal jurisdiction. For example, there are cases in which a diplomatic agent accredited to one State is sent by the accrediting State to attend events in the territory of a third State. In this case, this person enjoys not diplomatic immunity but the usual immunity of an official from the jurisdiction of that third State.[200]

100. Often the immunity of a Head of State is equated to diplomatic immunity. Thus the question of the immunity of the Head of a foreign State is sometimes decided by reference to national legislation.[201] In other cases, the authorities of the State exercising jurisdiction draw an analogy between the immunity of the Head of a foreign State and diplomatic immunity.[202]

---

[199] Further study is required to determine whether there exist customary rules of international law governing the status of members of special missions. As has already been noted, there are very few parties to this Convention. In addition, in order for members of special missions to enjoy the immunity granted by this Convention, a number of conditions specified therein must be met.

[200] As S. Wirth notes, "[d]iplomats and consular agents are state officials and therefore are protected not only by diplomatic immunity but also by state immunity (*ratione materiae*). This protection is necessary with regard to third states which are not bound by the regulations of diplomatic or consular immunity". Op. cit, pp. 883 and 884.

[201] For the legislation of the United Kingdom and Australia on this subject, see para. 37 above.

[202] For example, in its decision in the *Tachiona v. Mugabe* case, the District Court in New York noted: "... scope of protection would extend to heads-of-state a level of immunity from territorial jurisdiction at minimum commensurate with that accorded by treaties and widely accepted customary international law to diplomatic and consular officials ... As one court observed, it would be anomalous for states to confer upon their foreign envoys abroad diplomatic privilèges and immunities extending farther than the immunity they recognize for heads-of-state." United States District Court, Southern District of New York, 30 October 2001. There are also examples of how the question of immunity of other senior officials is resolved by granting diplomatic immunity and by applying the 1961 Vienna Convention. R. Higgins, in particular, describes the following situation: "Turning ... to the immunity of all kinds of senior officials, a recent ministerial order of the Schweizererische Bundesanwaltschaft is of some interest. The Order of 8 May 2003 refused to allow the 'Association for solidarity with victims of the war against Iraq' to bring a suit against George W. Bush, Dick Cheney, Donald Rumsfeld, Colin Powell, Condoleezza Rice, Bill Clinton, Tony Blair, Jack Straw and others for crimes against humanity, genocide and war crimes. The Order stated, inter alia, that in the absence of a warrant from an international court or tribunal, President Bush had absolute immunity. The Order then went to the Vienna Convention on Diplomatic Relations of 1962 and used article 31 (1) to grant immunity to ministers and high-ranking persons, noting that international law is not precise about the situation of high-ranking persons and the jurisprudence is evolving. "After Pinochet: developments on head of state and ministerial immunities", *The Incorporated Council of Law Reporting Annual Lecture* 2006, p. 4. Available at www.lawreports.co.uk.

101. The functional/representative rationale for diplomatic and consular immunity has been discussed above.[203] On the subject of the international law and political rationale for these immunities, M. Shaw notes "[t]he special privileges and immunities related to diplomatic personnel of various kinds grew up partly as a consequence of sovereign immunity and the independence and equality of states, and partly as an essential requirement of an international system. States must negotiate and consult with each other and with international organizations and in order to do so need diplomatic staffs. Since these persons represent their states in various ways, they thus benefit from the legal principle of state sovereignty".[204] Thus diplomatic and consular immunities have the same basis as the immunity of State officials.[205]

C. Summary

102. To sum up the first part (sections I-IV) of this preliminary report, the following points, inter alia, may be made:

(a) The basic source of the immunity of State officials from foreign criminal jurisdiction is international law, and particularly customary international law;

(b) Jurisdiction and immunity are related but different. In the context of the topic under discussion, the consideration of immunity should be limited and should not consider the substance of the question of jurisdiction as such;

(c) The criminal jurisdiction of a State, like the entire jurisdiction of the State, is exercised in the form of legislative, executive and judicial jurisdiction (or in the form of legislative and executive jurisdiction, if this is understood to include both executive and judicial jurisdiction);

(d) Executive (or executive and judicial) criminal jurisdiction has features in common with civil jurisdiction but differs from it because many criminal procedure measures are adopted in the pre-trial phase of the juridical process. Thus the question of immunity of State officials from foreign criminal jurisdiction is more important in the pre-trial phase;

(e) Immunity of officials from foreign jurisdiction is a rule of international law and the corresponding juridical relations, in which the juridical right of the person enjoying immunity not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign State not to exercise jurisdiction over the person concerned;

(f) Immunity from criminal jurisdiction means immunity only from executive and judicial jurisdiction (or only from executive jurisdiction, if this is understood to include both executive and judicial jurisdiction). It is thus immunity

---

[203] See paras. 86 and 87 above.

[204] *International Law*, fifth ed., Cambridge, 2003, pp. 668 and 669.

[205] Ultimately, the immunity of the State itself is behind all the immunities of all State officials from foreign jurisdiction. The International Law Commission drew attention to this in the commentaries to the draft articles on jurisdictional immunities of States and their property: "The fact that the immunities enjoyed by representatives of government, whatever their specialized qualifications, diplomatic or consular or otherwise, are in the ultimate analysis State immunities has never been doubted. Rather, it has been unduly overlooked." *Yearbook ... 1991*, vol. II (Part Two), p. 18, note 44.

from criminal process or from criminal procedure measures and not from the substantive law of the foreign State;

(g) Immunity of State officials from foreign criminal jurisdiction is procedural and not substantive in nature. It is an obstacle to criminal liability but does not in principle preclude it;

(h) Actions performed by an official in an official capacity are attributed to the State. The official is therefore protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae*. However, this does not preclude attribution of these actions also to the person who performed them;

(i) Ultimately the State, which alone is entitled to waive an official's immunity, stands behind the immunity of an official, whether this is immunity *ratione personae* or immunity *ratione materiae*, and behind those who enjoy immunity;

(j) Immunity of an official from foreign criminal jurisdiction has some complementary and interrelated components: functional and representative components; principles of international law concerning sovereign equality of States and non-interference in internal affairs; and the need to ensure the stability of international relations and the independent performance of their activities by States.

V. Issues to be considered when defining the scope of the topic

A. Boundaries of the topic

103. The following points should be considered when defining the boundaries of the topic. Firstly, it concerns only the immunity of State officials from foreign criminal jurisdiction. This means that the subject under consideration here is not immunity from international criminal jurisdiction or immunity from national civil or national administrative jurisdiction per se. Immunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction. International criminal jurisdiction is of a different legal nature, as it is exercised by international courts and tribunals. These courts and tribunals are established and therefore have and exercise their jurisdiction on the basis of an international agreement or decision of a competent international organization. This means that they have a mandate from the States themselves, or, as noted in the decision of the Special Court for Sierra Leone in *Prosecutor v. Charles Ghankay Taylor*, from the international community.[206] The principle of sovereign equality of States, expressed in the formula *par in parem non habet imperium*, which is the fundamental international law rationale for the immunity of State officials from foreign jurisdiction, cannot be the rationale for immunity from international

[206] Appeals Chamber, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, 31 May 2004, para. 51.

jurisdiction.[207] The absence of immunity of State officials from international criminal jurisdiction in the international law instruments on which the exercise of such jurisdiction is based cannot be invoked to claim that State officials therefore also do not have immunity from national jurisdiction, or as proof that they do not have such immunity. As for the immunity of State officials from other forms of national jurisdiction — civil and administrative — although such immunity is not per se a subject for consideration here, examples of their analysis in the practice of States and in doctrine are entirely relevant for the present topic, as the international law rationale for immunities of State officials from the various forms of foreign jurisdiction is one and the same.

104. Secondly, the topic is concerned with immunity of State officials, which is based on international law. Immunity may also be granted to officials of another State on the basis of national law. However, the granting of immunity under national law is of interest in the context of this topic only because the corresponding provisions of national law may be considered as one indication of the existence of rules of customary international law in this sphere.

105. Thirdly, the topic is concerned with immunity of officials of one State from the jurisdiction of another State. This means that there is no intention to consider immunity of officials from the jurisdiction of their own State per se.

B. Persons covered

1. All officials; definition of the concept of "State official"

106. There are many different definitions of the group of persons whose immunities should be considered in the context of this topic and who would be covered by the draft guiding principles or draft articles which may be prepared as a result of this review. More specifically, a first definition covers only the three officials directly referred to in the judgment of the International Court of Justice in *Arrest Warrant* and in the 1969 Convention on Special Missions, that is, Heads of State, Heads of Government and ministers of foreign affairs; a second definition includes all high-ranking State officials who enjoy immunity because of their post; a third definition

[207] "A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community." Ibid. This clearly refers to those cases when, in accordance with the constituent documents of the corresponding international court or tribunal, the State has international law obligations that deprive its officials of the right to immunity from the jurisdiction of that court or tribunal. At the same time, the principle of sovereign equality may in some cases also be the rationale for immunity from international criminal jurisdiction, for example, in a situation where the official of a State that is not a party to the Statute of the International Criminal Court is in the territory of a State party to the Statute and there is a request for the surrender of that official to the Court. As noted by H. Fox, "State immunity may serve as a bar to proceedings before an international tribunal — for example, the Rome Statute ... provides that a State may not be under an obligation to surrender to the ICC for trial an individual present in its territory who, as a representative of another State, enjoys diplomatic immunity; but its main significance relates to its effect upon the jurisdiction of a national court". "International law and restraints on exercise of jurisdiction by national courts of States", in M. D. Evans (ed.), op. cit., p. 363.

includes all incumbent and former State officials. The last definition seems entirely appropriate and preferable for this topic.

107. In the practice of States, especially in national court rulings and in doctrine, it is generally recognized that all State officials enjoy immunity from foreign criminal jurisdiction in respect of acts performed by them in their official capacity, or immunity *ratione materiae*. As noted by Lord Browne-Wilkinson in the Pinochet No. 3 case, "[i]mmunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity".[208] State officials enjoy such immunity regardless of the level of their post. For instance, in 2006 in *Belhas et al. v. Moshe Ya'alon* the United States District Court for the District of Columbia recognized the immunity of M. Ya'alon,[209] who had been the head of Israeli army intelligence at the time of the events underlying the case brought against him, while the French Court of Cassation in 2004 recognized the immunity from criminal jurisdiction of

---

[208] Pinochet No. 3, *International Legal Materials*, vol. 38 (1999), p. 580, at p. 594. A similar rationale for the need to extend immunity *ratione materiae* to all State officials was given by an English court in *Propend Finance Pty Ltd. v. Sing*: "The protection afforded by the Act of 1978 to States would be undermined if employees, officers (or, as one authority puts it, 'functionaries') could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself." High Court, Queen's Bench Division, 14 March 1996, reproduced in *International Law Reports*, vol. 11, p. 611. In Jones No. 1, Lord Philipps noted: "The dignity of a state may also be affronted if those who are or were its officials are impleaded in relation to the conduct of its affairs before the courts of another state. In those circumstances the state can normally extend the cloak of its own immunity over those officials. It can be said that to implead those officials amounts, indirectly, to impleading the state" (para. 105). Lastly, in Jones No. 2 (see note 80 above), Lord Bingham of Cornhill noted that there was "a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents" (para. 10).

According to C. Wickremasinghe, "[i]t appears that under the doctrine of State immunity, other State officials [other than heads of State, heads of government and ministers for foreign relations] enjoy immunity *ratione materiae* for their official acts from the jurisdiction of the courts of other States, where the effect of proceedings would be to undermine or render nugatory the immunity of the employer". Op. cit., p. 403. See also C. Forcese, "De-immunizing Torture: Reconciling Human Rights and State Immunity", *McGill Law Journal*, vol. 52 (Spring, 2007), p. 127, at pp. 138 and 139.

[209] United States District Court for the District of Colombia, *Belhas et Others v. Moshe Ya'alon*, 14 December 2006, 466 F. Supp. 2d 127. The judge determined that it was "undisputed" that M. Ya'alon at the time of the attack was acting in his official capacity and that his actions were conditioned by the need to defend the interests of the Israeli State. The basis for this conclusion was mainly a letter from the Ambassador of Israel in the United States to the United States Department of State Under-Secretary for Political Affairs. The letter, in particular, stated that anything that M. Ya'alon had done was in the course of his official duties and that his actions were "sovereign actions of the State of Israel, approved by the Government of Israel in defense of its citizens against terrorist attacks" and also that "to allow a suit against [the former official] is to allow a suit against Israel itself". Having established that Ya'alon acted in an official capacity, the judge considered that his actions could be seen as the actions of a State body/institution in the sense of the above-mentioned Foreign Sovereign Immunities Act.

the head of the Malta Ship Registry in connection with acts performed by him in his official capacity.[210]

108. The term "State official" is widely used in practice, including in judicial rulings and doctrine. Yet there is no definition of the concept of "State official" in international law, at least not in universal international agreements. As for doctrine, there is, for instance, the definition given by F. Przetacznik: "An official of a foreign State is a person who either, under its law, is invested with legal authority to act as its official representative (a head of State, a Head of government, or a Minister of Foreign Affairs) and is authorized by the sending State to act in the capacity of its representative (a diplomatic agent or a diplomatic member of a special mission), or to act officially on its behalf (a consular officer, a diplomatic member of a permanent mission to an international organization, or a diplomatic member of a delegation to a international conference) in the receiving state."[211] In this definition, the category of State officials is, in essence, limited to those persons who represent the State in international relations. At the same time, the official functions in respect of which State officials enjoy immunity are not limited to such representation. In this connection, the above-mentioned author has also stated: "The basic element of the notion 'an official of foreign State' is that he must either represent that State or officially act on its behalf or both."[212] Officials perform acts on behalf of the State not only in the area of foreign relations, but in all areas in which the State exercises its sovereign prerogatives. They are given full powers by the State in order to represent the State or otherwise act on its behalf in accordance with the State's law or practice. In addition to the term "State official", the terms

[210] According to the French court of cassation, "... la coutume internationale qui s'oppose à la poursuite des Etats devant les juridictions pénales d'un Etat étranger s'étend aux organes et entités qui constituent l'émanation de l'Etat ainsi qu'à leurs agents en raison d'actes qui, comme en l'espèce, relèvent de la souveraineté de l'Etat concerné". *Arrêt de la Cour de Cassation, chambre criminelle*, 23 November 2004, published in *Bulletin Criminel* 2004, No. 292, p. 1096. The text of the ruling is available at www.legifrance.com/.

[211] "Basic principles of international law concerning the protection of the officials of foreign states", paper delivered at the thirty-first annual convention of the International Study Association in Washington, D.C., on 11 April 1990, p. 52.

[212] Ibid.

"State representative",[213] "State agent",[214] "State organ"[215] are used. The last term is used in the articles on responsibility of States for internationally wrongful acts and includes, according to article 4, paragraph 2, "any person or entity which has that status in accordance with the internal law of the State".[216] In the commentary to this article, the Commission notes that the reference to a "State organ" is "not limited to the organs of central government, to officials at a high level or to persons with responsibility for the external relations of the State, [but also] organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy".[217] As the term "State organ" includes, but is not limited to, individual officials, its use seems appropriate for the purposes of this topic. At this stage at least, the terms "State official" may continue to be used. If the Commission in the future finds it appropriate to define this term or in some other way to indicate its meaning, the approach that it used for the drafting of article 4, paragraph 2, on State responsibility could also be useful mutatis mutandis for the present topic.

2. Officials enjoying immunity *ratione personae*

109. As already mentioned, all State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction and only some officials enjoy immunity *ratione personae*. It has not yet been possible to define this category of officials. It is appropriate to recall the difficulties experienced by the Commission in this connection when working on the draft articles on special missions, on representation of States in their relations with international organizations and on the prevention and punishment of crimes against internationally protected persons.[218]

110. First of all, the category of persons enjoying personal immunity naturally includes Heads of State. Their personal immunity from foreign criminal jurisdiction

---

[213] See, for example, article 2, paragraph 1 (b) (iv) of the Convention on Jurisdictional Immunities of States and Their Property. In the commentary to this provision (contained in the section on paragraph 1 (b) (v) of draft article 2), the Commission noted that the category of representatives of the State acting in that capacity encompassed "all the natural persons who are authorized to represent the State in all its manifestations". *Yearbook ... 1991*, vol. II (Part Two), p. 18.

[214] See, for example, J. Verhoeven, "Les immunités propres aux organes ou autres agents des sujets du droit international", in J. Verhoeven (ed.), *Le droit international des immunités: contestation ou consolidation*? (Brussels, Librairie générale de droit et de jurisprudence, 2004), p. 64. A. Borghi uses the term "les dirigeants politiques", including as the title of a book (see note 64 above).

[215] The term "organ of State" was used, for example, by parties in the *Case concerning Certain Questions of Mutual Assistance in Criminal Matters* relation to the State Prosecutor and the Head of National Security of Djibouti. The Counsel for France, A. Pellet, during the oral pleadings agreed with the Counsel for Djibouti, L. Condorelli, that "when they act in an official capacity, the organs of the State do not engage their own responsibility, but that of the State". However, in his opinion, "outside certain organs or categories of organs that can be counted on the fingers of one hand (head of State, minister for foreign affairs, head of government and diplomats — to varying extents moreover), it is totally excluded 'that it can be claimed that persons enjoying the status of an organ of State, even of a high rank, benefit from personal immunity (also known as *ratione personae*) in any way comparable to that which international law accords to the highest organs of States!'." *International Court of Justice*, document CR2008/5, oral argument, 25 January 2008, para. 15.

[216] *Yearbook ... 2001*, vol. II (Part Two), p. 40.

[217] Ibid., para. 6.

[218] See paras. 18-20 and 23 above.

has the broadest possible confirmation in practice and in doctrine.[219] However, Heads of State are not the only category of persons considered. Although previously it was only the Head of State (and ambassadors) who enjoyed personal immunity, the category of officials enjoying such immunity has started to expand.[220] There are objective reasons for this.[221] The nature and structure of administration of the State have changed. The functions of administering a contemporary State and ensuring its sovereignty and representation in international relations used to be concentrated in the person of the Head of State, but now belong to a significant degree to the Head of Government, members of the Government and, in particular, ministers for foreign affairs. In many countries, the Head of Government plays a larger role than the Head of State in the administration of the State. Hence the need to ensure the maximum independence and maximum security from interference by other States in the

---

[219] "Heads of States ... enjoy absolute jurisdictional immunity in all foreign States for all acts which would ordinarily be subject to the jurisdiction of those States, whatever the connection in which those acts were committed." *Marcos and Marcos v. Federal Department of Police*, Swiss Federal Tribunal, 2 November 1989, reproduced in *International Law Reports*, vol. 102, p. 198, at p. 203. "A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States." *Lafontant v. Aristide*, United States District Court, Eastern District of New York, 27 January 1994, reproduced in *International Law Reports*, vol. 103, p. 581, at pp. 584-585. "Grounded in customary international law, the doctrine of head of state immunity provides that a head of state is not subject to the jurisdiction of foreign courts, at least as to official acts taken during the ruler's term of office." *United States v. Noriega and Others*, United States District Court, Southern District of Florida, 8 June 1990, reproduced in *International Law Reports*, vol. 9, p.143, at p. 161. "Attendu que la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger" *Kaddafi* case, judgment by the Court of Cassation, criminal chamber, 13 March 2001, published in *Bulletin criminel* 2001 No. 64, p. 218. "Whilst international law evolves over a period of time international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State." *Mugabe*, Bow Street, 14 January 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (July 2004), p. 770.

According to A. Watts, "[s]o far as concerns criminal proceedings, a Head of State's immunity is generally accepted as being absolute ...". Op. cit., p. 54. Y. Simbeye also notes that "[a] sitting head of state, as the holder of the highest office and the representative of his state, is immune from legal suit in a foreign court". Op. cit., p. 94. As Verhoeven states, "Quelles que soient les incertitudes entourant la responsabilité pénale des agents de l'Etat, il n'est pas contesté que le chef d'Etat bénéficie d'une immunité pénale absolute devant les juridictions d'un Etat étranger. Le caractère absolu de l'immunité exclut qu'il puisse lui être apporté aucune exception, tenant par exemple à la nature de l'infraction qui lui est reprochée ou à la date à laquelle elle a été commise." "Les immunités de juridiction et d'exécution. Rapport provisoire" (December 2000), *Yearbook of the Institute of International Law*, vol. 69 (2000-2001), p. 516. See also Higgins R., op. cit., pp. 12-13.

[220] "Il existe en effet une tendance à étendre aux 'personnalités de rang élévé', pour reprendre la formule de la convention de New York du 16 décembre 1969 sur les missions spéciales, le bénéfice d'une protection particulière, comportant le cas échéant des immunités." J. Verhoeven, op. cit., p. 65.

[221] As noted by P. Toner, "[t]he modern political realities under which nation-states operate no longer allow for a strict differentiation of the powers and responsibilities of governmental ministers. The offices of foreign minister, and many other prominent ministerial positions, currently represent a state in the same way as a Head of State. Thus, to a greater extent than previously recognized, the rationale for immunizing a Head of State can be extended to other ministers". Op. cit, pp. 912 and 913.

activity not only of the Head of State but also of some other officials who are very significant for the State, thereby protecting the sovereignty of the State itself in its relations with other States. Above all, the category of officials enjoying personal immunity started to be expanded to include Heads of Government and ministers for foreign affairs in addition to Heads of State.

111. Heads of State, Heads of Governments and ministers for foreign affairs constitute, in a manner of speaking, the basic threesome of State officials who enjoy personal immunity. Under international law, only these three categories of officials are considered to be representatives of the State in international relations by virtue of their functions and consequently of their posts. Only these officials, for instance, can sign international treaties on behalf of their State without the need to produce full powers (article 7, paragraph 2, of the Vienna Convention on the Law of Treaties). The special status and, accordingly, the special nature of immunity of Heads of Government and ministers for foreign affairs, together with the special status and immunity of Heads of State, is confirmed in article 21 of the 1969 Convention on Special Missions, in article 1, paragraph 1 (a), of the 1973 Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and in article 50 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. These officials, together with Heads of State, are also mentioned by the International Court of Justice in its judgment in the *Arrest Warrant* case among the high-ranking State officials who enjoy immunity from foreign jurisdiction. It will be recalled that, in paragraph 51 of the judgment, the Court indicated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[222]

112. There are also examples of recognition of the immunity of a Head of Government from foreign jurisdiction in rulings of national courts. In 1988, in *Saltan and Others v. Reagan and Others*, the United States District Court recognized the immunity from jurisdiction of the Prime Minister of the United Kingdom, Margaret Thatcher, agreeing with the opinion of the United States Department of State on that issue.[223] In 2003, the Belgian Court of Cassation noted in *A. Sharon* that "la coutume internationale s'oppose à ce que les chefs d'Etat et de gouvernement en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux Etats concernés, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger".[224] The Belgian Court thus confirmed, after the International Court of Justice had done so, that immunity not only of the Head of State but also of the Head of Government from foreign criminal jurisdiction is based on customary international law.

113. There is a well-known instance in the Russian Federation of recognition of the immunity of the Head of a foreign Government in the pre-trial phase of criminal

---

[222] *I.C.J. Reports*, 2002, pp. 20 and 21, para. 51.

[223] *Saltan and Others v. Reagan and Others*, United States District Court, District of Columbia, 23 December 1988, reproduced in *International Law Reports*, vol. 80, pp. 19-24.

[224] *H.S.A. et al. v. S.A. et al.*, Decision related to the indictment of Ariel Sharon, Amos Yaron and others, Belgian Court of Cassation, No. P.02.1139.f, 12 February 2003, reproduced in *International Law Materials*, vol. 42, 2003, pp. 596-605.

proceedings. In 2005, a visit to the Russian Federation was planned for the Prime Minister of the Ukraine, Yulia Timoshenko, against whom a criminal case had been brought in the Russian Federation prior to her appointment to that position. The day before the visit, the General Procurator of the Russian Federation announced that the Prime Minister of Ukraine would not have any problems if she wished to travel to the Russian Federation, as senior State leaders, including Heads of Government, enjoy immunity.[225]

114. Apart from the *Arrest Warrant* case, there is hardly any information on cases in which the question of immunity of ministers for foreign affairs was considered. We do know that, in 1963, a United States court declined to consider a lawsuit against the Minister for Foreign Affairs of Korea, following the "suggestion of immunity" of the United States Government. It is noteworthy, however, that the State Department's "suggestion", in addition to stating that ministers for foreign affairs enjoy immunity from the jurisdiction of the United States courts in accordance with customary international law, also mentioned recognition of the diplomatic status of the Minister for Foreign Affairs of the Republic of Korea, because in that instance he was on an official visit to the United States.[226] In 2001, a United States District Court agreed with the "suggestion of immunity" submitted by the Government with regard to the Minister for Foreign Affairs of Zimbabwe in the *Tachiona v. Mugabe* case.[227]

115. The paucity of information on practice, including court rulings on the question of immunity of ministers for foreign affairs, led Judge Van den Wyngaert to state, in his dissenting opinion in the *Arrest Warrant* case, that "There is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international legal obligation".[228] The view that ministers for foreign affairs do not possess personal immunity has also been stated in the doctrine, even after the judgment in *Arrest Warrant*.[229] At the same time, the opinion of the International Court of Justice set

---

225 The text of this statement is available at http://www.newsru.com/russia/15feb2005/timoshenko.html.

226 *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit, State of Hawaii, 9 September 1963, reproduced in *International Law Reports*, vol. 81, pp. 604 and 605. The "suggestion of immunity" in this case spoke of immunity under customary law not only of a foreign minister for foreign affairs but also of a foreign Head of State.

It should also be noted that, in the wording existing at that time, the 1962 Restatement of Foreign Relations Law of the United States announced that Heads of Government and ministers for foreign affairs of States enjoyed, in respect of official and personal acts, the same immunity as Heads of State. *Restatement (Second) of Foreign Relations Law of the United States*, St. Paul, American Law Institute, 1962, paras. 66, 200 and 202.

227 District Court for the Southern District of New York, *Tachiona v. Mugabe*, Judgment of 30 October 2001, 169 F.Supp.2d 259, Judgment of 30 October 2001, p. 297.

228 *I.C.J. Reports 2002*, p. 139, para. 1.

229 See, for example, D. S. Koller, op. cit., p. 16: "The most comprehensive study of foreign minister immunity reveals that the rationale for according immunity to foreign ministers on private visits is much weaker than for Heads of State and is derived primarily from comity, not law. The necessity of immunity on private visits is a tough empirical question to which the Court's cursory handling — and the lack of available state practice — does not give due treatment. By simply blurring the distinctions between foreign ministers, Heads of State, and diplomats, the Court has created conceptual confusion."

forth in this judgment, for which the overwhelming majority of the judges voted, is shared by a number of authors.[230]

116. The above-mentioned judgment of the International Court of Justice concerning the immunity of the Minister for Foreign Affairs was referred to by the Republic of the Congo in its submission to the Court in the case *Certain Criminal Proceedings in France* and by Djibouti and France in the case *Certain Questions of Mutual Assistance in Criminal Matters*. Here the parties agreed with the view of the Court.[231]

117. As has already been noted, article 21 of the 1969 Convention on Special Missions and article 50 of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character single out, in addition to Heads of State, Heads of Government and ministers for foreign affairs, yet another category of persons possessing special status under international law: "persons of high rank". The fact that there are other high-ranking officials — apart from Heads of State, Heads of Government and ministers for foreign affairs — who under customary international law enjoy personal immunity from foreign criminal jurisdiction was confirmed in paragraph 51 of the judgment of the International Court of Justice in the *Arrest Warrant* case, mentioned in paragraph 11 above. It is obvious that, although the Court also did not say precisely which high-ranking officials — apart from Heads of State, Heads of Government and ministers for foreign affairs — enjoy immunity from foreign jurisdiction, it clearly confirmed that the category of such officials is not limited to the three mentioned.

118. This interpretation of the *Arrest Warrant* judgment was confirmed in at least two rulings of British courts. The 2004 ruling of the District Judge in the case of *General Shaul Mofaz* (then Defence Minister of Israel) notes "the use of the words 'such as' the Head of State, Head of Government and Minister for Foreign Affairs indicates to me that other categories could be included. In other words, those categories are not exclusive".[232] Thus distancing itself from the International Court of Justice judgment, the British court declined to issue an arrest warrant for the Defence Minister of Israel and recognized his immunity, giving a functional rationale similar to that which the Court gave for the immunity of a minister of foreign affairs.[233] With similar reference to the above-mentioned judgment of the

---

[230] According to A. Cassese, "[t]he Court must be commended for elucidating and spelling out an obscure issue of existing law. In so doing it has considerably expanded the protection afforded by international law to foreign ministers". Op. cit., p. 855. See also, for example, S. Wirth, op. cit, p. 889: "... it seems very plausible that the position of a Minister of Foreign Affairs is important enough to accord him or her the same immunities as a Head of State: a Minister of Foreign Affairs maintains the foreign relations of a state and thus plays a crucial role in the management of inter-state conflicts; in this respect, he or she is even more important than an ambassador, who — at least in the receiving state — enjoys immunity *ratione personae*."

[231] See, inter alia, the application by the Republic of the Congo dated 9 December 2002 instituting proceedings against France (p. 11) and the Memorial of Djibouti dated 15 March 2007 in the case *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (p. 51).

[232] District Court (Bow Street), *Re General Shaul Mofaz*, Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004), at p. 773.

[233] The British court stated, inter alia: "Although travel [in case of a Defense Minister] will not be on the same level as that of a Foreign Minister, it is a fact that many States maintain troops overseas and there are many United Nations missions to visit in which military issues do play a prominent role between certain States, it strikes me that the roles of defense and foreign policy are very much intertwined, in particular in the Middle East." Ibid.

Court, the immunity of Bo Xilai, Minister for Commerce and International Trade of China, was recognized in a case of the same name in 2005. The senior District Judge declined to issue an arrest warrant for the Minister, stating that "under the customary international law rules Mr. Bo has immunity from prosecution as he would not be able to perform his functions unless he is able to travel freely".[234]

119. The doctrine is careful to recognize that, in addition to the "basic threesome", there are other high-ranking State officials enjoying immunity from foreign jurisdiction.[235] In the case *Certain Questions of Mutual Assistance in Criminal Matters*, the parties also recognize in principle that the same immunity as is enjoyed by ministers for foreign affairs may also be enjoyed by certain other high-ranking State officials. However, they agreed that those concerned in *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*) — the State Prosecutor of Djibouti and the Head of National Security of Djibouti — were not among their number.[236] Mention may be made of examples of other State officials who enjoy or may enjoy immunity *ratione personae* (for instance, ministers of defence, ministers of foreign trade). However, the Special Rapporteur is not aware that an exhaustive list of such officials exists anywhere. As has been noted earlier, no list has been drawn up of other high-ranking officials enjoying special status and immunity and, in its work on the draft articles on special missions, the Commission quite rightly considered that the specific officials or posts are determined by the domestic law of the State.[237]

120. It seems that which other high-ranking officials enjoy personal immunity from foreign criminal jurisdiction can be determined, albeit in general terms, only if it is possible to determine the criterion or criteria to be met by these officials in order to enjoy such immunity. In the rulings of national courts cited above which recognized the immunity of the Minister of Defence and the Minister of Foreign Trade, the courts reasoned that the functions of these officials are to a large extent comparable

---

234 *Re Bo Xilai*, England, Bow Street Magistrates' Court, 8 November 2005, reproduced in *International Law Reports*, vol. 128, p. 714. It should be noted that the judge also referred to Mr. Bo's immunity as a member of a special mission. Ibid., p. 715.

235 As J. Verhoeven notes, "[l]a solution est plus incertaine lorsque sont en cause d'autres membres du gouvernement. Elle pourrait se revendiquer d'une logique incontestable lorsque ces autres ministres exercent des fonctions internationales, qu'il s'agisse par exemple de négocier des accords ou de représenter l'État à l'étranger. Il s'en faut de beaucoup néanmoins qu'elle soit à ce jour confirmée sans ambiguïté par la pratique internationale". Op. cit., p. 65. A. Cassese also notes that immunity *ratione personae* protects "only some categories of state officials, namely diplomatic agents, heads of state, heads of government, perhaps (in any case under the doctrine set out by the Court) foreign ministers and possibly even other senior members of cabinet". Op. cit., at p. 864. This opinion is also shared by B. Carter: "In the United States today, head of State immunity would seem to be available to a foreign state's head, foreign minister, and possibly their families and maybe other high-ranking officials. … In part because of its basis in case law, the doctrine is unclear regarding exactly who might be covered". "Immunity for foreign officials: possibly too much and confusing as well", *American Society of International Law Proceedings*, vol. 99 (March 30-April, 2005), p. 230.

236 As the Counsel of Djibouti, L. Condorelli, stated during the oral pleadings in The Hague on 22 January 2008, "Nobody here asks the Court to acknowledge that, like a Head of State or a diplomatic agent, the Public Prosecutor and the Head of National Security should benefit for the duration of their appointments from immunity from jurisdiction and complete inviolability abroad, extending to their private acts." *International Court of Justice*, document CR 2008/3, 22 January 2008, p. 9, para. 23.

237 See para. 19 above.

to the functions of a minister for foreign affairs and that they consequently need immunity in order to perform precisely this type of function. It is interesting that, according to this reasoning, in the case of *General Shaul Mofaz*, the judge stated that he considered it highly unlikely that "ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister would automatically acquire a label of State immunity".[238] The fact that immunity *ratione personae* may be enjoyed only by those other high-ranking State officials for whom representation of the State in international relations is an indispensable and primary part of their functions was mentioned by the Counsel of France, A. Pellet, during the oral pleadings in the case *Certain Questions of Mutual Assistance in Criminal Matters*.[239] According to K. Parlett, "immunity *ratione personae* is conferred on offices whose function is so important to the maintenance of international relations that they require a broad conferral of immunity".[240] Some other authors also mention the performance of functions of ensuring participation of the State in international relations as the rationale for possibly granting personal immunity to other members of the government in addition to the minister for foreign affairs.[241]

121. Admittedly, however, ensuring that the State participates or is represented in international relations is hardly a basic function of, say, the minister of defence or other members of the Government apart from the minister for foreign affairs (although, in today's global world, almost all cabinet members participate to varying degrees in international affairs, representing their country in specialized areas of international relations). At the same time, for the basic functions of a minister of defence, as for certain other high-ranking officials, there is usually special involvement in the solution of the most important issues affecting the sovereignty of the State. The exercise by a foreign State of criminal jurisdiction over serving officials of this type would be an obstacle to their independent activity in their posts and consequently to the exercise by the State which they are serving of the prerogatives inherent in its sovereignty. Because of the importance for the State of the functions performed by such high-ranking officials, the exercise of foreign criminal jurisdiction over them would quite likely involve interference by the State exercising jurisdiction in matters which are basically within the competence of the State served by these officials. In this connection, the question is whether the importance of the functions performed by high-ranking officials for ensuring the State's sovereignty is an additional criterion — in addition to ensuring the State's

---

[238] District Court (Bow Street), *Re General Shaul Mofaz*, Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004), at p. 773.

[239] According to A. Pellet, "immunities are not granted to officials of the State simply because, in the exercise of their functions, they may, fairly occasionally, or even regularly, have to make trips abroad. This only applies if such immunities are indispensable to those missions being carried out and provided they are inherent to the functions concerned". *International Court of Justice*, document CR 2008/5, 25 January 2008, p. 38, para. 63.

[240] "Immunity in civil proceedings for torture: the emerging exception", *European Human Rights Law Review*, No. 1 (2006), p. 59. The author consequently suggests that the other senior officials enjoying such immunity could include ministers of defence or permanent under-secretaries for foreign affairs. Ibid.

[241] See, for example, P. J. Toner, op. cit., pp. 912 and 913; C. Forcese, op. cit., p. 137; M. Du Plessis and S. Bosch, "Immunities and universal jurisdiction — The World Court steps in (or on?)", *South African Yearbook of International Law*, vol. 28 (2003), p. 246; and C. Wickremasinghe, op. cit., p. 401.

participation in international relations — for including the official among those enjoying immunity *ratione personae*.

3. The question of recognition in the context of this topic

122. Generally the question of immunity is considered with reference to recognized States and officials of such States, and recognized Heads of State and Heads of Government. However, there may be situations in which it is necessary to consider the question of immunity of a State that is not recognized by the State exercising jurisdiction or the question of immunity of an official of an unrecognized State or the question of the immunity of a person who is not recognized as the Head of State or Head of Government (in this case, the State itself is recognized but the Head of State or Head of Government is not). In these situations, the question of recognition becomes relevant to the consideration of the subject of immunity. As A. Watts notes, "the question of recognition ... will, in particular, usually be critical whenever any question of immunity arises".[242] This is confirmed, in particular, by a number of rulings by United States courts. For example, in the 1995 *Kadic v. Karadzic* case, the Court of Appeals for the Second Circuit noted that "recognized States enjoy certain privileges and immunities relevant to judicial proceedings".[243] Because the Government of the United States did not recognize Radovan Karadzic as the Head of State, the Court also did not recognize his immunity as Head of State. In 1990, in the case *United States v. Noriega and Others*, the District Court noted that "in order to assert Head of state immunity, a government official must be recognized as Panama's Head of State either under the Panamanian Constitution or by the United States".[244] Because the United States Government did not recognize Noriega as a Head of State, the Court declined to recognize that he enjoyed diplomatic immunity in that capacity. In the 1994 case *Lafontant v. Aristide*, on the other hand, the United States District Court agreed with the Executive's "suggestion of immunity" and recognized the Head-of-State immunity of Jean-Bertrand Aristide because the United States Government had recognized Mr. Aristide, who was living in exile in the United States, as the lawful Head of State of Haiti.[245]

123. The question of the immunity of officials of unrecognized States and unrecognized Heads of State and Heads of Government may arise in various contexts. One situation, for example, is when the entity served by the official whose immunity is under discussion is not recognized as an independent State by anyone,

---

[242] Op. cit., p. 34.

[243] *Kadic v. Karadzic*, Court of Appeals for the Second Circuit, Judgment of 13 October 1995, 70 F.3d 232, 64 USLW 2231, p. 244.

[244] *United States v. Noriega and Others*, United States District Court, Southern District of Florida, 8 June 1990, reproduced in *International Law Reports*, vol. 99, pp. 143-183.

[245] *Lafontant v. Aristide*, United States District Court, Eastern District of New York, 27 January 1994, reproduced in *International Law Reports*, vol. 103, pp. 581-593. It should be noted that, in the question of recognition in particular, in the context of the consideration of the question of immunity, the American and British courts rely on the opinion of the Executive. For example, in the judgment of the British Court of Appeal in the case *Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, Judge Somervell noted: "Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign States with ours in the matter of State immunities must flow from that decision alone." *Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, Court of Appeal, England, 20 May 1952, reproduced in *International Law Reports*, vol. 19, p. 215.

including by the State exercising jurisdiction. From the viewpoint of international law, immunity of a State official is based on the principle of the sovereign equality of States. This principle does not govern relations between the State exercising jurisdiction and an entity which is not recognized as a State. For this reason, it is difficult to speak of the right of officials of that entity to immunity or of the obligation, corresponding to that right, of the State exercising jurisdiction not to grant immunity. The situation is more complicated in the case of immunity of an official of a State that has been recognized by a significant segment of the international community but not by the State whose authorities are considering the question of immunity. The comment made above concerning the question of recognition in the context of the subject of immunity of officials of an unrecognized State is also applicable to the question of recognition in the context of the subject of immunity of unrecognized Heads of State and Heads of Government.

124. Any consideration of the role of recognition in the context of this topic must obviously include consideration of the substance of the question of recognition, including for instance the question of the declarative or constitutional character of recognition. This is not really part of the Commission's mandate on this topic. In this connection, the question is whether issues of recognition should in future be included within the framework of the topic under consideration and, moreover, whether any kind of provisions should be drafted on the role of recognition as related to the question of immunity of officials. It should be noted that the resolution of the Institute of International Law limits itself in this regard to a provision stating that the resolution "is without prejudice to the effect of recognition or non-recognition of a foreign state or government on application of its provisions".[246]

4. Family members

125. In practice, the question sometimes arises of the immunity of the members of the family of a Head of State (naturally this immunity can be only personal in nature). In 1991, in the case *Marcos et Marcos c. Office fédéral de la police*, the Swiss Federal Tribunal recognized the immunity of Imelda Marcos, the wife of the former President of the Philippines: "Customary international law has always granted to Heads of State, as well as to the members of their family and their household visiting a foreign State, the privileges of personal inviolability and immunity from criminal jurisdiction ... This jurisdictional immunity is also granted to a Head of State who is visiting a foreign State in a private capacity and also extends, in such circumstances, to the closest accompanying family members as well as to the senior members of his household staff."[247] Similarly, but this time in a civil case, the immunity of the wife of the President of Mexico was recognized by a United States court in 1988 in *Kline v. Kaneko*. The court stated that "[u]nder general principles of international law, heads of State and immediate members of their families are immune from suit".[248] In 1978, another United States court recognized the immunity from jurisdiction of the son of the Queen of England,

---

[246] *Annuaire de l'Institut de droit international*, vol. 69 (2000-2001), pp. 680-692, article 12, at p. 685.

[247] *Marcos et Marcos c. Office fédéral de la police, Revue suisse de droit international et européen*, 1991, p. 535 (English version in *International Law Reports*, vol. 102, p. 201).

[248] Supreme Court (New York County), *Kline v. Kaneko*, Judgment of 31 October 1988, 141 Misc.2d 787, p. 788.

Prince Charles, in the case *Kilroy v. Windsor (Prince Charles, the Prince of Wales) and Others*.[249]

126. However, there are also instances in which the immunity of the members of the family of a Head of State was not recognized by the courts. This was the case in *Mobutu v. SA Cotoni*.[250] In 1988, the ruling in this case of the Belgian Civil Court noted, inter alia, that the children of the President of Zaire had already attained their majority and thus were "distinct from their father and cannot in any case benefit from the same immunity as he is entitled to benefit from".[251] Similarly, in 2001 in the case *W. v. Prince of Liechtenstein*, the Austrian Supreme Court did not recognize the immunity of the sister and two brothers of the Head of State of Liechtenstein, because they were not close members of the family of the Head of State forming part of his household and entitled to immunity under customary international law.[252]

127. It should first be noted that, in the two cases mentioned in which the courts declined to recognize the immunity of members of the family of the Head of State, the rulings were based on the fact that the persons concerned were not among the immediate family of the Head of State and were not dependent on him. Perhaps the courts would have recognized the immunity of these persons if they had been family members more closely connected with the Head of State and forming part of his household. This is clearly indicated by the passage from the ruling of the Austrian court quoted above. Secondly, in three of the five rulings mentioned, the courts noted that immunity is granted to members of the family of a Head of State on the basis of customary international law. In the few cases on record where national legislation establishes the immunity of a Head of State (United Kingdom, Australia), it also establishes the immunity of family members forming part of his household[253] and of his spouse.[254] It will also be recalled that the immunity from the jurisdiction of the receiving State of members of the family of a diplomatic agent forming part of his household, of members of the family of a consular officer forming part of his household, of members of the family of a representative of the sending State in a special mission and of members of the family of a representative of a State to an international organization forming part of his household is established, respectively, in article 37, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, in article 53, paragraph 2, of the 1963 Vienna Convention on Consular Relations, in article 39, paragraph 1, of the Convention on Special Missions and in article 36, paragraph 1, of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

128. The doctrine reflects the various viewpoints. It is noted in *Oppenheim's International Law* that a comparison of the status of members of the family of a Head of State with the position of the family of a diplomatic agent indicates that members of the family of a Head of State forming part of his household enjoy

[249] United States District Court for the Northern District of Ohio, Eastern Division, 7 December 1978, *International Law Reports*, vol. 81, pp. 605-607.

[250] Civil Court of Brussels (Attachment Judgment), 29 December 1988, reproduced in *International Law Reports*, vol. 91, pp. 259-263.

[251] Ibid.

[252] Supreme Court, Judgment of 14 February 2001, 7 Ob 316/00x, para. 11.

[253] Section 20 (1) of the British State Immunity Act of 20 July 1978, reproduced in *International Legal Materials*, vol. 17, 1978, p. 1123.

[254] Section 36 (1)(b) of the Australian Foreign States Immunities Act of 1985, reproduced in A. Dickinson, R. Lindsay and J. P. Loonam (eds.), op. cit., pp. 269-522.

immunity from the jurisdiction of the host State.[255] The fact that members of the family of a Head of State and Head of Government are protected by immunity is also acknowledged by P. Gully-Hart.[256] In the view of A. Watts, the immediate family of a Head of State may enjoy immunity, but on the basis of comity and not of international law.[257] This view is endorsed by S. Sucharitkul.[258] The view that, if the members of the family of a Head of State are also granted immunity, it is on the basis only of international comity and not of international law was supported in the resolution of the Institute of International Law.[259]

129. Does the Commission need to consider the subject of immunity of members of the family of a Head of State (and possibly of other individuals enjoying personal immunity) under the topic? The Special Rapporteur has doubts on this score, because — strictly speaking — the subject of immunity of the members of the family of officials is outside the scope of this topic.

C. Summary

130. The contents of the second part (section V) of this preliminary report can be summarized in the following statements:

(a) This topic covers only immunity of officials of one State from national (and not international) criminal (and not civil) jurisdiction of another State (and not of the State served by the official);

(b) It is suggested that the topic should cover all State officials;

(c) An attempt may be made to define the concept "State official" for this topic or to define which officials are covered by this concept for the purposes of this topic;

(d) The high-ranking officials who enjoy personal immunity by virtue of their post include primarily Heads of State, Heads of Government and ministers for foreign affairs;

(e) An attempt may be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoy immunity *ratione personae*. It will be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for this category of high-ranking officials can be defined;

---

[255] R. Jenning and A. Watts, op. cit., pp. 1039 and 1040.

[256] "The function of State and diplomatic privileges and immunities in international cooperation in criminal matters: the position in Switzerland", *Fordham International Law Journal*, 1999-2000, No. 23, p. 1335.

[257] A. Watts mentions the difference between members of the family of a Head of State and members of the family of a Head of Government and of a minister for foreign affairs, and between the status of such persons, depending on whether they are present in the host State on an official or a private visit. Op. cit., pp. 75-80 and 110-112.

[258] *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10), paras. 446-450.

[259] *Annuaire de l'Institut de droit international*, vol. 69 (2000-2001), pp. 680-692, article 5, at p. 682.

(f) It is doubtful whether it will be advisable to give further consideration within the framework of this topic to the question of recognition and the question of immunity of members of the family of high-ranking officials.